Appendix A

INDIVIDUALS, ORGANISATIONS AND AUTHORITIES IN AUSTRALIA AND OVERSEAS WHO SUPPLIED INFORMATION FOR THE PROJECT

AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY

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100 Pacific Highway, North Sydney 2060

Messrs. Kilella, Hart, Goodrick and Larter,
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L. Lot and P. Croft, Traffic Accident Research Unit,
Department of Motor Transport,
50 Rothschild Street, Rosebery 2018

QUEENSLAND

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E. Finger, Department of Main Roads,
Boundary Street, Spring Hill 4000

B. C. Pyra, South East Queensland Electricity Board,
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Northern Territory Electricity Commission,
Alice Springs 5750

Road Traffic Division,
Department of Transport and Works,
Darwin 5790

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Hydro Electricity Commission,
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Appendix B

LEGAL IMPLICATIONS OF FRANGIBLE POLES FOR ROAD AUTHORITIES — INSTRUCTIONS TO COUNSEL TO ADVISE

Mr. S. MORRIS (Victoria)

(*NOTE*: A brief to Queensland Counsel, Mr. W. C. Lee, Q.C. was also prepared and submitted. Space does not permit the inclusion of that brief which was in essence identical to this brief, the difference being those matters pertaining to the Queensland statutes.)

BACKGROUND TO PROJECT

The Commonwealth Department of Transport has commissioned a research project into the legal implications surrounding the use of frangible or breakaway poles and traffic signals. The need arose because various State highway and electricity authorities had indicated concern that the use of this relatively new equipment would expose them to increased legal liability. The reasons for this belief were two fold.

Firstly, these authorities believed that because it is the very nature of a breakaway pole to yield, the incidence of accidents where poles fell would increase. Pedestrians and following motorists would be exposed to greater hazards and increased injuries and property damage would result. Secondly, many authorities felt that, as with the misfeasance-nonfeasance question, they would incur no liability if they continued to use their existing rigid poles. This attitude was reinforced by the fact that claims had never been made against them by a motorist or passenger injured in a collision with a rigid pole.

Their attitude was that while it was the responsibility of authorities to ensure that the roadway surface and design did not cause accidents and that the roads were adequately lit to minimise accidents, objects along the side of the road were not their problem. After all, poles are not in the path of motorists; if pole/vehicle collisions occurred it was the fault of the motorist — either he was under the influence of alcohol, or was reckless, careless or inattentive. Installing breakaway poles would not diminish the number of accidents and might, in their view, increase them.

In order to alleviate their concern and to clarify these questions, the Office of Road Safety, Department of Transport, commissioned this study on the legal implications for highway authorities of using or failing to use frangible or breakaway poles.

The investigators, throughout these instructions to advise, have concentrated on luminaire (street light) poles as the principal question. The reason for this choice is that breakaway luminaire poles have been extensively used in various countries and have been found to significantly reduce fatalities, injuries and property damage.

In the concluding section of these instructions to advise, the investigators have included material relating to three other types of breakaway devices: sign posts, traffic signals and electric cable-supporting poles and asked whether the same legal principles are applicable.

The project investigators concentrated on the following issues:

(1) If a frangible or breakaway pole were to fall and injure a pedestrian or motorist or cause property damage, would there be any liability on the part of the owner or controller of the pole on the ordinary principles of negligence?

(2) What is the behaviour of the various types of breakaway or frangible poles indicated by the experience in the jurisdictions which use them? Has there been any increase in injuries to or damage suffered by pedestrians or other motorists as a result of a falling column? Are there any constraints on their use which is justifiable by experience?

(3) What is the behaviour of rigid poles compared to breakaway poles? What is the difference in casualty and property damage rates?

(4) If a motorist or his passengers suffered injury or damage as a result of a collision with a rigid pole, are there circumstances where the owner or controller of the pole could incur liability on the ordinary principles of negligence?

(5) When considering the answers to questions (1) and (4), what authorities in each Australian State would be potential defendants?

(6) What are the legal implications for authorities for using or failing to use breakaway designs for other types of hazards (e.g. sign posts, traffic signals and electric cable-carrying poles)?

The project investigators have obtained the data necessary to provide answers to questions (2) and (3) and have formed tentative conclusions regarding the answers to questions (1), (4), (5) and (6). The

Department of Transport, as part of the project, has requested that counsel in several States be retained to advise on the applicability of these tentative conclusions to the particular statutory framework in those several States.

Advice from counsel will be utilised in the investigators' final report to the Department of Transport. This report will be circulated to road authorities and instrumentalities and may be tabled in Parliament.

STRUCTURE OF THE INSTRUCTIONS TO ADVISE

In these instructions to counsel to advise, the investigators have set out in the first part the factual material encompassed by questions (2) and (3) above (see p. 108), which is the necessary basis for any conclusions regarding liability.

In the second part, the investigators have attempted to identify those Victorian authorities which might theoretically incur liability in relation to street lighting on the four most common categories of roads in the state. *Counsel is requested to advise whether any authorities have been omitted or wrongly selected.*

In the third part, the investigators have set out tentative conclusions regarding liability for owing or controlling street lighting on the basis of the ordinary principles of negligence as applied to the factual situation and statutory framework in Victoria. *Counsel is requested to advise whether these conclusions are theoretically sound and also whether there is any other head of liability on which an action could be founded (e.g. public nuisance, breach of statutory duty etc.).*

In the fourth part, the investigators have discussed other types of roadside furniture: sign posts, traffic signals and cable carrying poles, for which frangible or breakaway designs are available. The investigators have briefly identified the statutory provisions regarding control of these devices and have suggested how the principles of negligence would apply to an authority's use, or failure to use these new designs. *Counsel is requested to advise whether these conclusions are correct.*

RIGID POLES VERSUS BREAKAWAY POLES

As counsel may be aware, there is a vast amount of literature, both Australian and overseas, which has been published on the hazards posed by rigid poles and on the alternatives which have been developed. In addition to surveying the literature on this area, the investigators sought comments from jurisdictions where alternative types of luminaire poles are in use. A list of the organisations which supplied information is included in an Attachment, and it will suffice to point out here that it included highway officials of 45 American States, Transport Canada as well as the highway departments of 5 Canadian Provinces, the New Zealand Roading Authority, the Netherlands Institute of Road Safety Research, the National Swedish Road and Traffic Institute, as well as the highway departments of all the Australian States, but most importantly and extensively that of South Australia. The investigators have attempted to summarise the literature on this area and the responses obtained from highway authorities.

Hazards Posed by Conventional Rigid Lighting Poles

It is well documented that conventional rigid luminaire poles, whether made of steel, concerete or timber, pose one of the greatest dangers to motorists. In terms of all fixed object collisions, luminaire poles rate near the top in terms of accident severity. Studies have indicated that somewhere between 33 to 40 per cent of all collisions with rigid luminaire poles will produce a fatality or injury. A study conducted by the University of Melbourne's Department of Mechanical Engineering has estimated that collisions with luminaire poles in the Melbourne metropolitan area account for 12 fatalities and 185 injuries annually.

The Alternative to Rigid Poles

Conventional lighting poles result in high accident severity because they are rigid, causing a vehicle to decelerate rapidly. This rapid deceleration of a larger mass against a smaller one is responsible for injury to the occupants. As the speed of the impacting vehicle increases, so too does the severity of the impact. Sideways impacts with rigid poles almost invariably produce severe injuries, regardless of whether seat belts are worn.

The general principle behind frangible or breakaway poles is that they yield at the base or slip off their foundation on impact, thus presenting very little resistance to the impacting vehicle. The impacting vehicle thus passes through the pole with only minimal deceleration and the driver is given an opportunity to recover control of his vehicle.

Research has indicated that collisions with breakaway poles rarely result in an injury and that property damage to the vehicle is dramatically less. A statement made to the investigators by R. W. Sanderson, Acting Head of the Road Systems Department of Transport Canada, best summarises the societal advantages of breakaway poles. As he stated:

> The question of frangible vs. conventional lighting poles has been well documented as to its benefits in reducing the severity of accidents. For speeds of 60 to 100 km/hr the severity of an accident is twice as high for conventional poles as it is for the frangible design. Similarly, for speeds of 100 to 110 km/hr it is in the order of 3½ times more severe. In line with this reduction in severity there is also a reduction in accident costs. T.R.R.L. Laboratory Report 660 showed that the cost of an accident involving a breakaway pole in about 20% of the cost associated with an accident involving a conventional pole.

There are basically three types of breakaway poles which are used in different jurisdictions. The first is the frangible pole, which is normally made of a light material such as aluminium or fibreglass, and which shears off at the base or bends on impact. The second type of pole, the slip-base, is the most commonly used. It yields to an impacting vehicle by the operation of a plate which slips off the base when the pole is struck, thus releasing the pole from it foundation. The third type of pole, which is a relatively new design developed

in Sweden and used in Northern Europe, is referred to as the ESV pole. It operates on a different principle to the shearing and slip-base types in that the ESV pole does not separate from its base and remains attached to the ground. The pole consists of steel rods spot-welded to a thin sheet steel skin. On impact the spot-welds fail leaving the thin sheet which deforms in response to the impact of the vehicle. The pole does not fall but rather entraps the impacting vehicle.

Usage of Breakaway Poles

The advantage of the ESV pole, which is in use in Northern Europe, is that it poses no danger either to pedestrians or other motorists because it remains fixed to the ground and does not fall. It also entraps the impacting vehicle without rapidly decelerating it thus preventing the vehicle from hitting other objects. The disadvantage of the ESV pole is that after impact it must be completely replaced and has no salvage value. The ESV pole may be the answer for those locations which there is a high volume of pedestrian traffic and low speeds.

Slip-base and frangible poles have been used for a number of years in the United States, the United Kingdom, Canada, New Zealand and South Australia. The frangible pole has the disadvantage of failing to yield when hit at low speeds and also generally requires total replacement after an impact.

Slip-base poles are by far the most commonly used throughout the world. In the United States, where legislation requires that breakaway devices be installed on federally funded roads (*Highways Act*, 23 U.S.C. § 402, 23 C.F.R. § 1204.4 sec. 12, standards I and J, copies of which are found in an Attachment) the slip-base pole enjoys popularity. The South Australian Highways Department has used these poles quite extensively for the last ten years. The slip-base has the advantage of yielding at low speeds and also costing less in real terms because of the fact that it can often be remounted after an impact.

Because slip-base and frangible poles are designed to yield to an impacting vehicle, concern has been expressed that they could pose a hazard: either they could fall and hit a pedestrian or they could fall and injure or cause damage to a following motorist or his vehicle.

Behaviour of Breakaway Poles

The behaviour of a falling luminaire pole is determined by the speed of impact. Research conducted in the Netherlands and the United States has shown that it is extremely unlikely that a pole will fall on the road surface. Experiments have shown that where the speed of the impacting vehicle is above 35 km/hr, the impacted pole will rotate above its centre of inertia and will fall in the direction of movement of the impacting vehicle and parallel to the roadway. It is only in instances where the speed is less than 35 km/hr that a falling pole is likely to encroach on the roadway.

The use of safety poles with either slip-bases or frangible features is by no means novel to the Common Law world. Indeed their use is wide-spread and wholly accepted throughout the United States, Canada, and New Zealand, and they are considered neither controversial nor exceptional.

The investigators undertook to contact responsible government instrumentalities throughout the United States, Canada and New Zealand in order to ascertain the degree of acceptance that safety poles enjoy, and the agencies' experiences with them. A detailed questionnaire was sent to all the States of the United States, the Canadian Provinces as well as to New Zealand. It was feasible only to send the questionnaire to State authorities rather than local authorities. This has resulted in a sample which is skewed to the use of safety poles on freeways and State highways, as against roads controlled by local authorities, but which nonetheless validly indicates the condition of use and limits, if any, in the majority of situations. The questionnaire was responded to by 45 of 50 United States Departments of Transport and Highways, 5 of 10 Canadian Provincial Departments, and the responsible Ministry in New Zealand.

The results of the questionnaire reveal that all 45 United States States responding, 4 of 5 Canadian Provinces, and New Zealand make extensive use of safety poles as luminaires. The responses show a clear preference for slip-bases, but frangible poles of steel, aluminium, and fibreglass are also employed.

The results of the questionnaire regarding limits on location of safety poles cannot be stated as systematically because not all respondents were able to supply full descriptions. The following conclusions were drawn:

(1) A substantial minority of jurisdictions use safety luminaires without any restrictions whatever.

(2) Other jurisdictions, while endorsing safety poles as playing a significant role in minimising the incidence and severity of accidents, limit their use in the interests of safety. Perhaps this attitude is best summed up in the response by the Georgia State Traffic and Safety Engineer who stated ". . . breakaway lighting poles are used everywhere without restrictions unless greater hazards would be created by falling poles."

(3) A minority of jurisdictions do not employ safety poles where there is a high density of pedestrian traffic, or where there is a sidewalk (footpath) which is usually indicative of a pedestrian safety zone.

(4) Some jurisdictions only employ safety luminaires on streets on which the speed limit is above a specified figure. The figures vary between the equivalent of 50 km/hr to 75 km/hr with the most common figure the equivalent of 65 km/hr.

(5) Some jurisdictions, due to financial constraints, cannot generally replace all existing rigid poles with safety poles, and indeed a small minority find themselves unable to use safety poles in all new developments. These jurisdictions tend to use the poles in those areas which they perceive to be the most hazardous locations, e.g. intersections, where the pole is especially near the running lane, or a location identified as a "black spot" due to previous collisions.

All jurisdictions were asked whether they had any statistical evidence of a safety pole having caused an injury to another motorist or pedestrian as a result of a secondary accident, that is, being dislodged by a motorist and falling upon, or dangerously obstructing the path of, someone other than the occupants of the impacting vehicle.

Not one jurisdiction indicated that such an event had occurred. The only record of any secondary accident occurred in New Jersey where a bulldozer had knocked over a pole, fatally injuring a construction worker. The clear pattern to emerge from the responses of the overseas jurisdictions, some of whom have had the safety poles in operation for up to two decades, is that they greatly lessen personal injury and property damage, and do not cause secondary accidents.

It is important to bear in mind that although there may be a theoretical risk, based on research experiments, of a falling column injuring a pedestrian or causing damage or injury to a motorist, the possibilities of it doing so are remote. Research has shown that pole/vehicle collisions are generally more likely to occur at times when pedestrian and traffic volumes are light.

Nevertheless, some of the jurisdictions contacted expressed concern at the theoretical possibility and have built in constraints on the locations where breakaway poles are used, both in terms of prevailing traffic speeds and pedestrian traffic.

STATUTORY PROVISIONS CONCERNING STREET LIGHTING IN VICTORIA

Counsel is requested to consider the statutory provisions regarding control over street lighting in Victoria with a view to selecting and determining defendants. In relation to Victoria, only the four most common classes of roads are considered: residential streets and roads, main roads, State highways, and freeways.

Generally, control over public roads in Victoria is vested either in the Country Roads Board or in the local council of a municipality in which the road is located. (A list of the relevant statutory provisions and a summary thereof are contained in an Attachment.)

Control over public roads ranges from residential streets which are under the control of the local council to freeways which are exclusively under the control of the Country Roads Board. In between are the categories of main roads and State highways which are mainly controlled by the Country Roads Board but in which there is involvement by both the local council and the electricity authority in aspects relating to street lighting. These categories are examined in more detail below.

Residential Streets and Roads

Statutory Framework

By the term residential streets and roads are meant those roads which are not declared under the provisions of the *Country Roads Act* 1958. This category includes a range of streets, made or unmade, passing through residential or commercial/shopping areas, with low or middle range speed limits, to open roads where the State maximum speed limit is permitted.

Generally, the local council has the care and management of these roads, having the power to "make improve and maintain" and the duty to keep open for public use and free from obstruction. (*Local Government Act* 1958, sub-ss. 535(1), (2) and 553(1).) The materials of these roads, the erections placed thereon and the scrapings thereof belong to the council. (*Local Government Act* 1958, s. 551.)

The council is empowered to erect lamp posts for the lighting of these streets or may contract with another body to do so and to vest them in the local council. (*Local Government Act* 1958, sub-s. 687(2).) If these fittings are damaged, the electrical undertaker or the State Electricity Commission is empowered to recover payment for damage caused which is enforceable in the Magistrates' Court. (*Electric Light and Power Act* 1958, s. 52; *State Electricity Commission Act* 1958, s. 107).

Operation

The normal practice is that the council determines whether or not to light a particular area and if it decides upon street lighting, it then refers the matter to the State Electricity Commission or electrical undertaker which draws up plans for the location and design of the lighting which are then sent back to the council for approval. The State Electricity Commission (or undertaker) is generally responsible for the installation, maintenance and operation of the street lighting, for which the council pays.

When a fitting is damaged, it is the State Electricity Commission or electrical undertaker which is notified and effects repairs and assumes the responsibility of recovering compensation from the motorist for the damage caused (A sample letter to a motorist from the State Electricity Commission is included as an Attachment.) The council will rarely have actual notice that one of their fittings has been damaged (although if the State Electricity Commission is the council's agent, then the council will have constructive notice). The council may be advised of the accident, indirectly, by the Road Safety and Traffic Authority in its quarterly reports, if personal injury or a fatality result from the accident. This knowledge may be of importance in determining whether the council has a duty of care in the particular circumstances and whether there has been a breach of that duty.

The investigators have formed the tentative conclusion, given that a negligence action might lie in appropriate circumstances, that the appropriate defendants in respect of street lighting on this type of road would be the local council and/or the State Electricity Commission (or electrical undertaker). The local council could be liable on the grounds of its ownership of the pole. The State Electricity Commission could be liable because of its agency relationship with the council, or alternatively because it exercises control over the lighting and might be classified as an occupier.

Counsel is requested to advise whether, and on what basis, the local council and the State Electricity Commission would be appropriate defendants.

Main Roads and State Highways

Statutory Framework

Generally, main roads and State highways are the responsibility of the Country Roads Board but there are areas of shared responsibility. The Board has the responsibility of declaring which roads shall be main roads and which State highways. (*Country Roads Act* 1958, ss. 18, 70.) The Governor in Council by Order published in the Government Gazette shall confirm such declaration.

Local councils have no financial responsibilities regarding State highways except in relation to cost-shared street lighting, but councils are required to maintain main roads within their area. (*Country Roads Act* 1958, sub-ss. 72(1), (2) and (5), s. 24.)

Local councils are given the same powers over main roads and State highways as over other public roads in their area, except where inconsistent with Part II of the *Country Roads Act* 1958. (*Country Roads Act* 1958, ss. 64, 74.) This means, in effect, that local councils have very few powers in relation to main roads and State highways because Part II of the *Country Roads Act* 1958 specifically empowers the Board to undertake certain things. On the other hand, the Governor in Council may confer upon the Board by regulation, any right, power, protection, privilege or obligation relating to the construction or maintenance of main roads or State highways which are conferred on a council by any Act relating to local government. (*Country Roads Act* 1958, ss. 68, 78.)

The provisions of the *Country Roads Act* 1958 indicate that primary responsibility for main roads and State highways vests in the Board. The materials of main roads and State highways, erections placed thereon and the scrapings thereof are deemed to belong to the Board. (*Country Roads Act* 1958, sub-s. 43(2), s. 74.) The Board is given general powers of supervision over main roads and State highways, e.g. power to apply to a Magistrates' Court for removal of trees which obstruct. (*Country Roads Act* 1958, sub-s. 55(1), s. 74.) The Act also provides that any person who places an obstruction on the roads without the Board's consent or other lawful authority shall be liable to a penalty. (*Country Roads Act* 1958, ss. 53, 74.) The Act also provides that any person who damages or interferes with any roadside fixture, including street lights, shall be liable to a penalty. (*Country Roads Act* 1958, ss. 52A, 74.)

The Board is responsible for initiating action to have street lighting installed on those sections of main roads and State highways which, in the opinion of the Board, require to be lit. The Board must initiate this action and, once initiated, it is the duty of the Board to obtain approval from the Street Lighting Committee. (*Country Roads Act* 1958, ss. 112B, 72B.)

The Street Lighting Committee's function is to determine a minimum level of street lighting; to examine plans and, where the lighting provided is not lower than the standard, to approve them; to resolve problems or disputes associated with street lighting schemes; and generally to do whatever is required by the Act. (*Country Roads Act* 1958, s. 72A.)

The role of the Street Lighting Committee is to approve the scheme so as to enable cost-sharing to take place. Once approved, the costs of installation, maintenance and operation shall be shared one-third each by the local council, the Board and the State Electricity Commission (or electrical undertaker). (*Country Roads Act* 1958, s. 112B, sub-s. 72(5).)

There is nothing in the Act which suggests that the Country Roads Board enjoys any unusual immunity from suit and in fact it would appear that the possibility of liability is envisaged. (*Country Roads Act* 1958, s. 62.)

Operation

There are two types of street lighting on main roads and State highways: cost-shared lighting, which is of a standard determined by the Street Lighting Committee, and council-controlled street lighting which is below the standard.

(i) Lighting below the standard

It would appear that local councils may provide street lighting which is below the standard of street lighting required for cost-sharing purposes. In this case, the street lighting is the responsibility of the local council in the same manner as for ordinary street lighting on roads directly controlled by them. It would seem to be normal practice for the local council to obtain the consent of the Board before placing street lighting on a main road or State highway. It is unclear whether this is just practice or because the Board's consent is required. Counsel is referred to the *Country Roads Act* 1958, s. 53. An interesting contrast is provided by s. 106 which relates to freeways.

It is tentatively suggested that in relation to non-cost-shared street lighting placed by a council on a main road or State highway, given that a negligence action might lie in appropriate circumstances, the appropriate defendants would be the local council and the electricity authority in the same manner as for a street directly under the control of the local council. In addition, the investigators suggest that the Country Roads Board would be an appropriate defendant because the pole, being an erection, is deemed to belong to them under the provisions of sub-s. 43(2) and s. 74, and also because they have, presumably, authorised its placement. *Counsel is requested to advise whether this conclusion is well-founded.*

(ii) Cost-Shared Lighting

The Board is required to initiate action to ensure that those sections of main roads and State highways which require to be lit (as determined by the Board) to the standard, are so lit. The Board does this by entering into negotiations with the appropriate local council. After preliminary agreement, the State Electricity Commission is requested to draw up plans for the installation's design. These plans then have to be approved by the Board and the local council. When this has been done, the Street Lighting Committee is requested to approve the installation for cost-sharing purposes which then results in the cost of the street lighting (installation, maintenance and operation) being borne one-third each by the local council, the Board and the State Electricity Commission or electrical

The investigators have posed the following questions: undertaker. All three bodies at some stage have approved the design of the lighting and the plans for its location. It is the understanding of the investigators that the Street Lighting Committee in the past has been concerned primarily with the question of the intensity of the illumination as they did not consider that their terms of reference were wide enough to encompass safety aspects relative to design.

As with street lighting under council control, the State Electricity Commission or electrical undertaker is the body to whom collisions with street lights are notified. They take all the necessary action to recover from the motorist under the provisions of the *Electric Light and Power Act* 1958 and the *State Electricity Commission Act* 1958.

The investigators have tentatively concluded that should liability arise in respect to this category of street lighting, the three bodies — the local council, the Board, and the State Electricity Commission (or undertaker) would be appropriate defendants. *Counsel is requested to advise whether this conclusion is sound.*

Freeways

Statutory Framework

Freeways are under the direct control of the Country Roads Board. The Board declares that a road is a freeway and publishes that resolution in the Government Gazette. (*Country Roads Act* 1958, s. 101A.) Unlike other categories of roads, no Order from the Governor in Council is required. The Board is solely responsible for the construction of, improvements to, or maintenance of freeways. (*Country Roads Act* 1958, sub-s. 99(1).) Councils have no financial responsibilities in relation to freeways. (*Country Roads Act* 1958, s. 103.)

The general powers which the Country Roads Board has in relation to main roads and State highways, it also has in relation to freeways. (*Country Roads Act* 1958, s. 101.) The materials of freeways, the scrapings and erections thereon belong to the Board. (*Country Roads Act* 1958, s. 101.) Local council rights also exist except where inconsistent with the provisions of the *Country Roads Act*. (*Country Roads Act* 1958, s. 101.)

The Act expressly prohibits the placement of any fixtures on or along the road by any person or other body without the written consent of the Board. (*Country Roads Act* 1958, s. 106.)

Operation

Freeways are currently the only roads in Victoria which have breakaway poles. The Board installs slip-base poles for lighting on freeways where the location is without other protection (e.g. guard-rail or safety fence, or sufficient set-back in the case of high mast lighting).

On older freeways, the State Electricity Commission was responsible for the installation and operation of the street lighting, but on newer works, such as the Eastern Freeway, the Board has assumed responsibility. When an accident occurs which damages lighting on a freeway, the Board's regional office is notified and the Board attempts to recover the cost from the driver.

The investigators suggest that should liability arise, the Board would be the appropriate defendant. *Counsel is requested to advise whether this conclusion is correct.*

LABILITY IN NEGLIGENCE OR NUISANCE FOR USING OR FAILING TO USE FRANGIBLE POLES

The investigators have examined reported cases dealing with the question of liability in respect of poles along or on the road with a view to determining whether any liability could attach to an authority for using or failing to use a breakaway pole.

Although the investigators are of the view that the appropriate cause of action in respect of injury or damage suffered as a result of a pole-vehicle collision would be negligence, consideration has also been given to the question of public nuisance. As explained in the succeeding section, some writers have suggested that the placement of a non-breakaway pole along the road might constitute an actionable public nuisance, and this area is briefly examined.

In this section, the investigators have considered whether an action framed in negligence and brought by a party who was injured or suffered damage as a result of a pole-vehicle collision would have any chance of success against a road authority which installed, maintained or controlled the pole.

Liability in Negligence

Counsel is requested to consider whether any of the Victorian instrumentalities mentioned earlier could incur liability in negligence for installing a breakaway device which, when impacted, falls and injures a pedestrian or causes damage to the property of a third party. Alternatively, counsel is requested to advise whether an instrumentality which installs rigid poles in a location where a breakaway device would be better suited could incur liability in negligence for injuries to the motorist or his passengers.

The investigators are of the opinion that the answer in both instances can be determined by reference to the ordinary principles of negligence. In their view there are only two areas of difficulty which require close examination and the answers to these depend very much on the facts surrounding a particular situation.

The first relates to the question of whether or not the conduct engaged in (i.e. the installation of the breakaway or rigid device) constitutes evidence of a breach of a duty of care. In other words, would a reasonably prudent road engineer, with a proper consideration of all the factors, have installed such a device in that particular location?

The second area of difficulty which is of concern is the extent to which a court will review a decision of a statutory authority regarding the installation of a particular type of pole. If an authority considered all relevant factors when reaching a decision, will a court impose liability for a wrong decision, i.e. an error of judgment? These two questions are considered in a later part of this section.

(i) Is there a duty of care on the part of road authorities to motorists or pedestrians?

(ii) How is conduct evaluated in order to determine whether there has been a breach of duty; what is the standard of care required of a road authority?

(iii) How is the question of causation dealt with?

(iv) Will a court look behind the decision of the road authority to determine whether relevant considerations were taken into account?

There has been some suggestion by American legal writers that the failure by a road authority to use the safest possible devices along the road might constitute negligence. (For a discussion of this question, counsel is referred to Fitzpatrick, et al., *The Law and Roadside Hazards*, (Michie, 1975) particularly pp. 176-295; Hricko, "Roadside Hazards — Responsibility and Liability", *Federation of Insurance Counsel Quarterly*, 3-13, extracts from which are found in an Attachment.)

The investigators looked at reported cases in the following jurisdictions: United States, United Kingdom, New Zealand, Canada and Australia in an attempt to find authority for the proposition that a road authority might be liable in negligence for failing to use the safest design of roadside fixture. Although nothing was discovered which specifically stated this, a number of American decisions (which dealt, for the most part, with private utility companies) have suggested that this is a logical development.

The investigators refer counsel to a recent decision of the Court of Appeal which dealt with an analogous situation. In *Levine* v. *Morris* [1970] 1 All E.R. 144, the liability of a road authority for negligence in the siting of sign posts was discussed. In this action on behalf of an injured and a deceased passenger, the Court held that the driver was negligent in driving and the Ministry of Transport was negligent in the siting of the sign posts which the driver struck. Liability was apportioned 75 per cent to the driver and 25 per cent to the Ministry.

(Counsel may wish to refer to case notes written: Poole, "Responsibility of Highway Authorities for Traffic Hazards", *New Law Journal* (6 November, 1975), 1059-1060; "Negligence in Siting Highway Signs", 64 *Qld. J.P.*, 107-109. Counsel may also wish to refer to *Moore* v. *Woodman* [1970] V.R. 577, where it was alleged that a tramways post was negligently sited or constituted a nuisance. Although the question which was in issue was whether in an affidavit of documents the Tramways Board was required to disclose the existence of reports relating to previous accidents at that site, there are some interesting remarks by Gillard J. at 580.)

The facts of *Levine* v. *Morris* can be easily adapted to the situation of a luminaire pole. The question of the design of the pole is just another factor to be taken into consideration in relation to location. In *Levine* v. *Morris*, Russell, Sachs and Widgery L.JJ. had no difficulty in arriving at the conclusion that the Ministry of Transport, when siting the signposts, were under a duty to motorists who might leave the roadway to take reasonable care not to impose unnecessary hazards to their safety.

The argument put forward by the Ministry that their only duty was to erect a visible sign and that they were under no duty to consider whether the sign posts themselves constituted a hazard was rejected by the Court, Sachs L.J. stating (at 148) that the argument was "quite untenable". His Lordship pointed out that it was a well known risk that motorists might leave the carriageway, often through no fault of their own. He stated (at 148): "The chances of such accidents happening ought always to be borne in mind by the Ministry, and the extent of those chances ought to be assessed."

Sachs L.J. limited this duty, in the case of signs off the carriageway, to those situations "where the configuration of the road makes it foreseeable that there is that type of above-average risk of serious accident which is now under consideration" (at 148-9).

Their Lordships having agreed that a road authority has a duty to motorists, in some circumstances at least (e.g. a dangerous stretch of road), to site with care those devices which might constitute a hazard, considered the question of what conduct would amount to a breach of this minimum duty of care.

In *Levine* v. *Morris*, the roadway in question was sub-standard for the posted speed and had a deceptive gradient. As Sachs L.J. pointed out (at 149): a skilled engineer would have foreseen that drivers "who had perhaps not the fullest degree of skill" might leave the road, particularly in wet weather. There was evidence that the group engineer, the divisional engineer and the county surveyor had considered that the sign posts were badly placed and likely to cause serious injury if a motorist collided with them. (There was also evidence of other accidents having occurred at that location.)

The fact that an alternative and equally visible location was available was of importance in determining whether there was a breach of duty. As Russell L.J. sated (at 152):

> If a choice of sites is available, both consistent with the proper functioning of the sign, then, in my judgment, the duty of reasonable care requires that consideration be given to the question of relative probability of a vehicle leaving the road and passing over one site rather than the other.

Widgery L.J. indicated that consideration should have been given to the risk of collision and that a competent engineer should have formed such views and would have acted on them. As His Lordship stated (at 151):

> I conclude on the evidence that it was the duty of the responsible engineer when siting this sign to consider the risk of collision as one of the factors affecting its siting. If this had been done by any competent engineer, it seems to me that he would have inevitably recognised both a serious hazard presented by the sign in that position, and the comparative ease with which that hazard could be avoided by the resiting. It seems to me that the failure to consider those matters and to reach that conclusion, and having reached that conclusion to put it into effect, constitutes a breach of duty on which the plaintiffs rely in this case.

Their Lordships had no difficulty in finding that the sign posts were responsible for the damage suffered by

the plaintiffs. Sachs L.J. dismissed the matter briefly (at 150): "The accident was of a type that one would expect in bad weather on this substandard road, and to my mind that ends the matter." Widgery L.J. agreed (at 152) stating that ". . . the accident arose out of just the kind of risk which had made the siting of the sign dangerous".

But Widgery L.J. envisaged that collisions could occur which would be too remote to be within the foreseeability of a road engineer. As His Lordship stated (at 152):

> I fully accept that, notwithstanding the negligence of the designer, he would not have been liable to a motorist who collided with the sign for some reason wholly unconnected with the particular risks which had justified the conclusion that the siting of the sign was dangerous.

The Ministry put forward a final argument which is of importance in the light of later decisions regarding the negligence liability of statutory authorities. (Counsel is referred to *Anns and Others* v. *London Borough of Merton* [1977] 2 All E.R. 492; *Takaro Properties Ltd.* v. *Rowling* [1978] 2 N.Z.L.R. 314. For comments on the former, counsel is referred to Craig, "Negligence in the Exercise of a Statutory Power", 94 *L.Q.R.* 428, and Seddon, "The Negligence Liability of Statutory Bodies: Dutton Reinterpreted", 9 *Fed. L. Rev.* 326.)

The Ministry argued that they had considered the question of siting and that, at most, their decision was an error of judgment. The trial judge stated that there was no evidence to suggest that such an appreciation had been made and that the Ministry had failed to call witnesses who had been involved in the decision and that therefore the Ministry had failed to substantiate the point.

Sachs and Widgery L.JJ. considered this question. Sachs L.J. reviewing the trial judge's findings that the Ministry had brought forward no witnesses to substantiate the point, stated (at 150):

> In those circumstances, it is not open to the Ministry to say that the siting was only an error of judgment, for no one embarked on judging at all; one cannot have an error of judgment when no judgment has been attempted.

Widgery L.J. pointed out that there are often conflicting considerations of both efficiency and safety which it is proper to consider. His Lordship went on to say (at 151):

> . . . if a competent engineer designing a highway had weighed all these conflicting considerations and come to a conclusion on them, the court should be extremely slow to take a different view.

It is clear from the judgment of Sachs L.J. at least that the burden of proving that relevant considerations had been taken into account lay on the Ministry. If they do not substantiate this claim then they cannot state that they committed a mere error of judgment. What is unclear is whether the result would have been different if the Ministry, by calling witnesses involved in the decision-making, could show that they had taken all the factors into consideration.

The investigators have some doubt as to whether the findings in *Levine* v. *Morris* would be expressed in the same manner as a result of the recent House of Lords decision in *Anns* v. *London Borough of Merton* [1977] 2 All E.R. 492. Although the investigators are of the opinion that the House of Lords' decision will not affect the existence of liability in respect of street lighting where it is the result of a statutory duty (e.g. as in the case of cost-shared lighting on main roads and State highways, where the Board is required to light the street to an approved standard where the Board thinks necessary), but it may be of importance where the road authority has only a statutory power to light the streets (e.g. residential streets where the council has the *power* to erect street lights).

In *Anns* case their Lordships held that there was a difference between statutory duties carried out negligently and statutory powers carried out negligently. Lord Wilberforce stated (at 503) that: ". . . in the case of a power, liability cannot exist unless the act complained of lies outside the ambit of the power." His Lordship also stated (at 501):

> A plaintiff complaining of negligence must prove, the burden being on him, that action taken was not within the limits of a discretion bona fide exercised, before he can begin to rely on a common law duty of care.

If this dictum is applied literally, in relation to authorities which have statutory powers to light as opposed to duties, then it may be necessary for the plaintiff to show that the authority acted outside its powers before any negligence liability can attach. This would not, in the investigators' view, be an unsurmountable burden as in most cases the failure to utilise the safest design of street lighting would more than likely be the result of a failure to exercise discretion or taking into account irrelevant considerations, both of which would render the decision outside power.

It may well be that *Anns* case is not relevant to the situation under examination here as the facts in *Anns* case relate to an omission to act which was contrary to the authority's own rules. In the situation under consideration, it is the negligent acts of a road authority in adopting a design for street lighting which is under consideration, not its failure to light the streets.

Some Hypothetical Situations

The investigators pose four hypothetical situations which may assist counsel in advising whether a road authority could incur liability in negligence for the type of design of a luminaire pole installed along the road. The investigators' tentative conclusions are detailed at pp. 117-118 below.

(i) A breakaway luminaire pole installed on a freeway with a speed limit of 100 km/hr is struck by motorist A. The pole falls across the offside lane and damages a car being driven by motorist B. B sues A for the damage which the falling pole caused to his car. Is A well advised to join the Country Roads Board on the grounds that placing a breakaway pole along a freeway constitutes negligence?

(ii) A breakaway luminaire pole installed on a main road with a speed limit of 45 km/hr is hit by motorist C. The pole falls and injures a pedestrian D who is walking along the footpath. D sues C whose insurance company wants to join the Country Roads Board, the local council or the State Electricity Commission on the grounds that placing a breakaway pole along a main road which has a low posted speed and a footpath constitutes negligence.

(iii) A conventional timber luminaire pole installed on a State highway with a speed limit of 60 km/hr is hit by motorist E. His passenger F is seriously injured. F sues E and E's insurer wishes to join the Country Roads Board, the local council and/or the State Electricity Commission for negligence in jointly maintaining a rigid pole. It can be established that if E's car had hit a breakaway pole instead of a rigid one, F would not have been injured as he was wearing a seat belt.

(iv) A conventional timber luminaire pole installed on a State highway with a speed limit of 45 km/hr is struck by motorist G who, although uninjured, has his car severely damaged. G wishes to bring an action against the Country Roads Board, the local council and/or the State Electricity Commission for negligence in jointly maintaining a rigid pole in a situation where it is likely to be struck and cause injury and damage. The State Electricity Commission requests G to pay for the damage caused to the pole, which he refuses to do. The State Electricity Commission proceeds against G under s. 52 of the *Electric Light and Power Act* 1958. G counterclaims for the amount of damage to his car.

In situations (i) to (iv) would the conclusion be different if the driver left the road negligently?

In relation to the four hypothetical situations posed above, the investigators have tentatively concluded that liability could be determined in the following manner:

Situation (i)

The investigators, as mentioned in an early section, have obtained answers to questionnaires from jurisdictions where frangible poles are in use regarding the behaviour of such poles and have examined reports on experimental research which has been conducted. The investigators have found that such poles do not fall on the travelled way unless hit at a speed below 35 km/hr.

It could be argued by the Board that, although it owes a duty of care to motorists who may be in the vicinity when a frangible pole is hit, the type of accident described in situation (i) is not reasonably foreseeable.

Alternatively, the Board could point out that when deciding on the type of lighting to install on the freeway, it had given consideration to the remote possibility of a frangible pole falling after impact and causing damage to a motorist, but decided that the use of frangible poles would lessen the frequency and severity of fatalities, injuries and damage on that freeway which outweighed the remote possibility of a falling pole causing damage. It is unlikely that a court would hold that the installation of frangible poles in these circumstances constituted a breach of the Board's duty of care to motorists who might be in the vicinity of an accident.

Situation (ii)

The investigators' research has failed to disclose any instance where a pedestrian has been injured by a falling pole. Nevertheless, some jurisdictions feel that constraints in using frangible poles are justified where the speed is below 35 to 40 m/hr (56-64 km/hr) or where there is a footpath or the likelihood of pedestrian traffic. Other jurisdictions, notably South Australia, feel that few constraints are justified and use them in all areas under their control. (Areas of high pedestrian volume such as Adelaide are not under their control.)

In relation to this hypothetical situation, it may be possible to argue that it is not reasonably foreseeable that a pedestrian would be hit. This might be successful. Alternatively, it would be open to the Board to argue that it had considered this risk but, as in the case regarding freeways, had decided that the benefits outweighed the risks. Again, it is unlikely that a court would find that their conduct constituted a breach of duty to pedestrians who might be in the vicinity.

Situation (iii)

It is accepted that collisions with breakaway poles rarely cause injuries to car occupants. On the other hand, research conducted by the University of Melbourne and many others suggests that rigid conventional timber poles pose a grave danger to a motorist who leaves the road. The likelihood of an occupant receiving an injury in such an accident is high. Although the motorist leaves the roadway for reasons unconnected with the pole, the fact that a collision with a rigid pole aggravates injury should be sufficient to allay any doubts regarding causation.

The Board would not be able to deny that it owed a duty of care to motorists who leave the road, particularly if the pole is located near to the travelled edge or if it is a sub-standard road.

If the Board were able to state that it had considered the question of placing a frangible pole but had rejected it on the grounds that it exposed others to greater danger or on the grounds that the Board did not have the financial resources to do so, it is unlikely that its conduct would be found to constitute a breach of duty.

On the other hand, if the Board, through its relevant road engineer, had simply decided that a rigid pole was appropriate, and thus failed to exercise its judgment on the matter, it is likely that its conduct would constitute a breach of a duty of care. The likelihood of the plaintiff succeeding would be enhanced if there was evidence of previous accidents at the particular spot of which the Board had notice.

Situation (iv)

The answer to this situation is the same as for situation (iii) except that the conduct of the claimant motorist would become more of an issue. Assuming that his conduct was not negligent or that it was only

marginally so and that the roadway exhibited features similar to that in *Levine* v. *Morris*, he might be able to succeed in having his loss apportioned against the Board.

The investigators have not found any reported decisions on the meaning of s. 52 of the *Electric Light and Power Act* 1958. This provision originated in the *Electric Light and Power Act* 1896, s. 50. Counsel may wish to refer to *Burgess* v. *Morris* (1897) 61 J.P. 553 and *Ashton* v. *Eccles Corporation* (1906) 71 J.P. 55. Both of these decisions involved equivalent provisions in English legislation. The investigators conclude that, irrespective of the cause of the collision, there would be no defence to an action brought under s. 52. In other words, a motorist is strictly liable for any damage done to a pole.

The investigators have suggested that, given appropriate circumstances, a road authority might incur liability for failing to use breakaway light poles. On the other hand, the investigators find it difficult to imagine circumstances, given the actual behaviour of these poles, where an authority would incur liability for using a breakaway pole which falls and injures a pedestrian or motorist. In both instances, the investigators suggest that the crucial question will be the consideration given by an authority, when erecting or replacing poles, to the alternatives available to minimise danger, whether that be re-location or design.

Counsel is requested to advise whether the Country Roads Board, the State Electricity Commission and/or a local council could incur liability for (i) maintaining a rigid pole which is impacted by a motorist causing injury or damage and (ii) maintaining a breakaway device which on impact falls and injures a pedestrian or motorist.

Poles as Public Nuisances

The investigators have considered whether poles or other hazardous objects could, because they are an obstruction on a public highway, constitute an actionable public nuisance. Some American writers, as explained below, have considered this a possibility.

The importance of an action for public nuisance is two-fold: (i) the relative unimportance attached to the motorist's conduct and (ii) the possibility of being able to obtain an order for the removal of a hazard.

The investigators are of the opinion that the law relating to public nuisance in Australia is that statutory authorisation is a defence to an allegation of public nuisance. Counsel is referred to *R.* v. *United Kingdom Electric Telegraph Co. Ltd.* (1862) 9 C.C.C. 174, an early authority which stands for the proposition that a pole placed at the side of the road is an obstruction even though it does not hinder the free passage of traffic and constitutes a public nuisance if placed without lawful authority. (Counsel is also referred to *R.* v. *Train and Others* (1862) 9 C.C.C. 180, and to Pearce and Meston, *The Law Relating to Nuisances*, (Sweet and Maxwell, 1926), pp. 115-182, particularly 135-136.)

Counsel is referred to an early decision of the Victorian Full Court where the plaintiff alleged both negligence and nuisance in respect of the placing of a guide post with which his horse collided. The Full Court there stated:

> No presumption of a nuisance legitimately arises from the mere fact that posts have been placed by a municipal council upon a road under its control and management, for the protection of the public passing along the road. (*Birmingham* v. *President etc. of the Shire of Berwick* (1883) 9 V.L.R. 344 at 345.)

Counsel is also referred to a judgment of Griffith C.J. in *Fullarton* v. *North Melbourne Electric Tramway and Lighting Co. Ltd* (1916) 21 C.L.R., 181, where His Honour states (at 188):

> In the case of undertakings such as railways, tramways, telegraphs or telephones, it is obvious that the authorised works cannot be carried out without doing many things that are nuisances at common law, such as the erection of posts and laying of rails on highways and stretching wires above them. Such nuisances must be taken to be authorised.

As mentioned above, some American legal writers have suggested that, quite apart from the question of negligence, the installation of hazardous roadside equipment (e.g. utility and luminaire poles, traffic control devices etc.) constitutes an actionable public nuisance. See — Fitzpatrick, Sohn, Silfen and Wood, *The Law and Roadside Hazards* (Michie, 1975) pp. 32-36, 308-340; Annotation — Collision with Traffic-Control Device, 7 American Law Reports 2d (A.L.R. 2d) 226-251, particularly 230-231, 235-236 and 238-239. (Counsel is referred to the extracts contained in an Attachment.)

Most of the American authorities rely on the case of *De Lahunta* v. *Waterbury* (1948) 59 A. 2d 800, 7 A.L.R. 2d 218 (Counsel is referred to the extract contained in an Attachment) as authority for the proposition that an object placed by a highway authority under general statutory powers might constitute a public nuisance. Fitzpatrick et al., referring to *De LaHunta* v. *Waterbury* state (at 316):

> This case would lend great support for the contention that non-breakaway poles are public nuisances.

The investigators have doubts as to whether this is a correct exposition of the law. In *De Lahunta* v. *Waterbury* the municipality, which was acting as a highway authority, had not complied with the requirements necessary to obtain approval for the installation of the device and the structure itself was a violation of the State traffic commission's regulations regarding the size and elevation. It could therefore be argued that the municipality of Waterbury had acted outside its powers and therefore was not able to obtain the benefit of statutory authorisation, and, hence, they could be liable to the injured parties in public nuisance.

The investigators have found a number of American decisions which tend to cast doubt on the correctness of the view expressed by Fitzpatrick et al that a pole, the placement of which was authorised by statute, might constitute a public nuisance :*McKim* v. *City of Philadelphia* (1907) 66 A 340; *City of Prichard* v. *Alabama Power Co.* (1937) 175 So. 294; *Simpson* v. *City of Montgomery and Alabama Power Co.* (1968) 211 So. 2d 498. (Counsel is referred to 39 Am. Jur. 2d

"Highways, Street, and Bridges", §458, pp. 855-856, an extract of which is contained in an Attachment.) These decisions clearly indicate that what would otherwise be a nuisance if placed on the street is legalised if done under statutory authorisation.

It is the investigators' tentative conclusion that an injured motorist or passenger would not be able to sustain an action in public nuisance against either the Country Roads Board, a local council, or the State Electricity Commission in respect of a pole installed and/or maintained by any or all of them. This is based on the fact that the statutory provisions clearly give each of these bodies the authority to place poles for the purpose of lighting along the road and thus they are protected against a public nuisance action.

Counsel is requested to advise whether this conclusion is well-founded.

UTILITY POLES, SIGN POSTS AND TRAFFIC CONTROL SIGNALS

Conventional rigid sign posts, traffic control signals and utility poles (poles supporting electric cables) pose varying degrees of danger to a motorist who strays from the carriageway. Of these three types of fixtures, utility poles are the most hazardous, both in terms of incidence and accident severity. Whereas posts for roadside signs and supports for average sized traffic control signals can be made to break away, poles supporting electric cables are not quite so amenable, because of the danger of bringing down live wires.

Each of these roadside fixtures is discussed below in terms of the hazard presented to a motorist and the technological solutions available to ameliorate the problem. In the succeeding part, the statutory framework of control over these three types of devices is mentioned, and the Victorian instrumentalities and authorities responsible for their installation and control are identified and some comments made regarding their potential liability.

In the final part of this section, the investigators pose the question of whether a Victorian instrumentality could incur liability on the basis of the ordinary principles of negligence for using or failing to use one of the breakaway devices available or for failing to take other steps to lessen the likelihood and severity of an accident.

Utility Poles

The Hazard

A study conducted by the University of Melbourne's Department of Mechanical Engineering estimated that collisions with utility poles (i.e. poles whose primary function is to support electric cables) account for approximately 30 fatalities and 600 injuries annually in the Melbourne metropolitan area. Statistics from New South Wales show that the casualty rate (number of injuries and fatalities divided by the number of accidents) is very high (over 50%), thus confirming the significant hazard which this type of object poses to a motorist leaving the road.

The Alternatives

The University of Melbourne study suggested that there are basically two alternatives available which would solve or, at the very least minimise, the present hazard. The first involves the removal of the offending pole either by relocation (e.g. increased lateral offset from the curb, or relocation upstream or downstream) or by undergrounding the cables which that particular pole supported. The second alternative is to utilise a breakaway device which, although yielding at the base on impact, would continue to provide support and keep the electric cables suspended.

(i) Removal of the Pole

The University of Melbourne's study concluded that there are a number of factors which contribute to the occurrence and severity of pole accidents. Such factors as the horizontal curvature of the roadway, the traffic flow rate, the skid resistance of the surface, road width, superelevation of the roadway, placement on the inside or outside of a bend, and the lateral offset of the pole from the curb, all influence whether a pole is likely to be impacted and also the resulting severity of such an accident. In relation to the lateral offset of the pole, the authors of the University of Melbourne study state:

> The results indicate that the probability of an accident involving poles at the pavement edge is 3.5 times higher than for poles which are set 3 m back from the road edge. They also show that little further reduction in accident probability is achieved by moving the pole back from 3 m to a 12 m offset.

The importance of lateral offset is confirmed by material gathered from the United States where highway authorities do not permit a utility pole to be located within 30 feet of the edge of the carriageway, unless exceptional circumstances exist.

The University of Melbourne study developed a model which predicts the probability of a pole/vehicle collision taking place at a particular site. They tested their model against actual collisions which occurred during their eight month period of data collection. In this study, which covered 879 pole/vehicle collisions, they found that 10 poles were impacted on multiple occasions, with one being struck six times. They have estimated that, in terms of major roads, approximately 10 per cent, or 500 poles, present a high risk of collision.

Poles identified as hazardous (either because they have been involved in a collision or because they have a high accident probability, according to the model) could either be relocated to a less hazardous position, upstream or downstream of their present site, or their lateral offset increased to at least 3 m from the pavement edge. Alternatively, in some circumstances it is feasible to underground the cables past the offending pole, thereby completely removing the hazard. Another option available where poles cannot be relocated or the cables undergrounded, is to protect the motorist by the installation of properly design guardrails, or in some situations, impact attenuators.

In the present study, the responses to the questionnaire sent by the investigators revealed that the method employed by most States in the United States to avoid

car/pole collisions with poles carrying cables or power, is usually by proscribing the presence of such poles within certain limits of the centre of the road or road edge.

Many States therefore will authorise a pole within the clearway (9.13 m) at the side of a road only if it is shielded from motorists by a barrier, placed behind a non-mountable curb or on the up-slope of a ditch, or placed on a slip-base. The minimum distance of set-off from the running lanes will vary based upon the width of the road, the speed limit imposed, nature of the surrounding territory etc.

(ii) Breakaway Design

During the last five years, researchers both in Australia and the United States have been experimenting with designs for a breakaway pole which would be suitable for supporting overhead electric cables. The idea is that the pole will yield at the base while the cross beams detach from the pole, keeping the cables aloft. This procedure could be used to modify existing utility poles, although the researchers point out that a modified pole will still present some hazard to the motorist.

The investigators' overseas inquiries have not revealed any jurisdiction which now uses a modified breakaway utility pole. Breakaway poles would only be a feasible alternative to poles in the middle risk range where neither relocation nor undergrounding are possible.

Sign Posts and Traffic Control Signals

The Hazard

Rigid sign posts and traffic control signals also pose a threat to the motorist who leaves the carriageway, although not to the same extent as rigid luminaire and utility poles.

In the University of Melbourne study, the researchers reported 82 traffic control signal/vehicle collisions, accounting for 3 fatalities and 23 injuries. This casualty rate of slightly over 30% is borne out by statistics supplied by the Traffic Research Unit in New South Wales.

Although the University of Melbourne study did not include sign posts, New South Wales findings suggest that the casualty rate for this type of accident is a little over 20%. In order to place these statistics in perspective, it should be pointed out that sign post/vehicle collisions in New South Wales accounted for 299 incidents for the particular year, whereas rigid luminaire and utility poles collisions for the same year numbered 2,557. Nevertheless, rigid sign posts and traffic control signals account for a significant number of fatalities and injuries annually.

The Alternatives

The Australian Standard Manual of Uniform Traffic Control Devices (Standards Association of Australia, AS 1742, 1975) describes a traffic control device as:

> any sign, signal, pavement marking or other installation placed or erected by a public authority or official body, having the necessary jurisdiction, for the purposes of regulating, warning or guiding road users.

The Standard goes on to state:

> As safety of the road use is of major importance in traffic and highway engineering, traffic control devices should not, of themselves, present a hazard to road users by contributing to the occurrence or severity of accidents. . . . If the sign is located in an exposed position consideration may need to be given to the use of a frangible or break-away type of construction, or other means of safety protection for the road user at the sign supports.

Technically, it is a simple matter to make most sign posts safe. Smaller supports can be made frangible by using galvanized steel pipes of small diameter or seasoned hardwood which is either notched or thin enough to yield on impact. Larger signs can utilise the slip-base device used for luminaires, in which case they will break away, or else they can be placed on aluminium supports, in which case they will yield or bend on impact.

In relation to traffic control signals, the matter is more difficult technically, because of the number of electrical cables in the base. Nevertheless, it is possible to make the smaller pedestal mounted traffic control signals frangible. In Melbourne, for example, new installations (although not specifically designed for this) will yield on impact.

Traffic signals are placed on frangible poles in 18 of the 45 United States jurisdictions responding to the questionnaire, and in half of the relevant Canadian provinces. They are not, however, used where the mast arm extends over the running lane as it is thought that the fall of the signal into the road creates a greater danger than the use of a rigid traffic signal poses to the errant motorist. Thus, the use of frangible traffic signals is widely confined to pedestal mounted signals.

Many States expressed a preference for a wire span traffic signal extended from poles well clear of the running lanes. This design minimises the danger that an intersection will be left uncontrolled following a pole/vehicle collision, and also minimises danger to both motorists and pedestrians.

Statutory Provisions Concerning Utility Poles, Sign Posts and Traffic Control Signals

Counsel is requested to consider the statutory provisions regarding control over utility poles, sign posts and traffic control signals with a view to selecting and determining potential defendants. (Copies of the relevant statutory provisions are found in an Attachment.) These provisions and the manner in which authorities comply with them are set out below.

Utility Poles

In Victoria, the supply of electricity may be undertaken by either the State Electricity Commission or an electrical undertaker. Herein reference will be made to the powers, duties and operation of the State Electricity Commission, although the investigators suggest that the conclusions are equally applicable to an electrical undertaker.

Statutory Framework

The relevant powers and duties of the State Electricity Commission are set out in ss. 20, 21, and 106 of the

State Electricity Commission Act 1958 (Vic.). Section 21 gives the Commission the power to "construct maintain and work" any electrical undertaking and to supply electricity. Paragraph 106(1)(b) gives the Commission the power to conduct or transmit electricity via poles etc. "over through under along or across any lands street road bridge". Paragraph 106(1)(f) gives the Commission power to enter upon any public or private lands streets or roads and construct any works and erect on under over along or across the same any poles and electric lines etc. and to repair or remove any such works.

Section 108 provides for the resolution of disputes between other government departments and municipalities and the Commission, and, by sub-s. 108(1) it is stated that unless expressly provided, the Act shall not affect any rights powers authorities or duties of any other government department.

Section 107 incorporates s. 52 of the *Electric Light and Power Act* 1958 (Vic.) which, as the investigators explained in the section relating to street lighting, allows the Commission to recover the cost of repairing damage caused by a motorist to a fixture under the control of the Commission.

Counsel is referred to the provisions of the *Local Government Act* 1958 (Vic.) and the *Country Roads Act* 1958 (Vic.) (s. 551 and sub-s. 43(1), ss. 74, 101 respectively) wherein fixtures along the road are vested, respectively, in the local council or the Country Roads Board. *Counsel is requested to advise whether this provision in any way alters the question of the Commission's ownership of, and responsibility for, poles placed along different categories of roads.*

Operation

It is the investigators' understanding that the Commission, when it wishes to install a pole, seeks the permission of the local council, and, in some cases, the Country Roads Board. What is unclear to the investigators is whether a council or the Board can refuse to permit the erection of a pole (with the exception of freeways, where the Board clearly has the power — see s. 106 of the *Country Roads Act* 1958).

Counsel is requested to advise whether, given circumstances which would amount to negligence, the Commission could incur liability for installing and maintaining a utility pole along the road. In addition, counsel is requested to advise whether it would be advisable to join either the Board or the local council (depending on the road category) on the basis of the provisions mentioned above which deem them to be owners of roadside fixtures.

Sign Posts and Traffic Control Signals

Statutory Framework

By sub-s. 4(1) of the *Road Traffic Act* 1958 (Vic.), the Governor in Council is empowered to make regulations with respect to the regulation and control of traffic. In particular, paragraph 4(1)(b) empowers the Governor in Council to make regulations prescribing standard warning and operative signs and their siting. Sub-section 5(1) of the Act provides that the Governor in Council may by Order require any council, the Country Roads Board or the Melbourne and Metropolitan Board of Works to remove, alter or improve any sign or device.

The *Road Traffic Regulations* 1973, made pursuant to the *Road Traffic Act* 1958 (Vic.) divides traffic devices into two categories: "Major Traffic-control items" and "Minor Traffic-control items". (Reg. 102.) Traffic control signals, as well as many of the more important roadside signs (e.g. clearway signs, intersection stop signs, de-restriction or restriction signs, etc.) fall into the category of Major Items.

Regulation 307 differentiates between these two categories of items. In relation to major traffic-control items, a highway authority may, on roads under its control, erect, remove or alter major traffic-control items only with the written consent of the Road Safety and Traffic Authority. Minor traffic-control items may be erected, removed or altered by a highway authority without any recourse to other bodies.

By Regulation 102. a highway authority is defined as the Country Roads Board in respect of certain categories of traffic-control items located in State highways, main roads, tourists' roads and freeways. In all other respects a highway authority is defined as the authority legally responsible for the care and management of the highway. If that body is the Country Roads Board, then the council of the municipal district within which the highway is located is deemed to be the highway authority.

On the question of ownership of traffic devices, counsel is referred to s. 551 of the *Local Government Act* 1958 (Vic.) which states that fixtures along the road belong to the local council, and sub-s. 43(1) of the *Country Roads Act* 1958 (Vic.) which states that the materials of main roads and fixtures thereon belong to the Board. (State highways: s. 74; freeways: s. 101.)

Operation

As mentioned above, there are two categories of traffic control devices which may be erected by a local council, the Country Roads Board or other bodies. In relation to major traffic control items, the written consent of the Road Safety and Traffic Authority must be obtained. Unlike other States, such as Queensland, where compliance with an external standard (such as the Manual of Uniform Traffic Devices) is required by the legislation, in Victoria it is the responsibility of the Road Safety and Traffic Authority to determine whether the particular device should be permitted.

It is the understanding of the investigators that the Road Safety and Traffic Authority, when authorising the erection of a particular device, does not specify any particular standard to be followed. The Authority's officers believe that it is somehow implied that the body erecting the device will follow an appropriate standard. The Authority, if notified of a dangerous device, does request the relevant body to make alterations.

The investigators have formed the tentative conclusion, given that a negligence action might lie in certain circumstances, that the selection of the appropriate defendant would depend on the type of device and the classification of the road. In relation to roads which are not declared and are under the control of a

local council, the investigators are of the opinion that the appropriate defendant would be the local council. In relation to main roads and State highways, the appropriate defendant would be the Country Roads Board, although, depending on the circumstances, the local council should be joined. In relation to freeways, the Country Roads Board should be defendant.

Counsel is requested to advise whether this conclusion is valid.

Liability in Negligence

It is the investigators' opinion that the installation and maintenance by a Victorian instrumentality of hazardous utility poles, roadside signs and traffic control signals could constitute negligence in the same manner as described earlier in relation to rigid luminaire poles.

The investigators suggest that, in relation to the transmission of electricity via roadside poles, the Commission is under a duty to ensure that the cables are carried safely so that no escape of electricity can take place. Additionally, it is suggested that the Commission owes a duty to road users to ensure that their poles do not constitute a hazard to a person leaving the carriageway. The Commission must, when installing or replacing a pole, give consideration to this double safety issue.

Failure by the Commission to take steps to minimise danger where a pole is known to pose a risk (as, for example, where the same pole was impacted on six separate occasions) constitutes a prima facie breach of that duty for which an injured motorist or his passengers may recover.

The investigators have pointed out in an earlier section that there are two widely used alternatives open to the Commission in respect of most poles which pose a hazard: relocation or undergrounding. The investigators have not considered at length the question of the Commission's liability if they used the breakaway model and it fell injuring someone or causing damage (whether by the actual fall or escaping electricity), as the model is not yet in use and it is therefore difficult to come to any definite conclusions as to its behaviour. It is the investigators' conclusion that, if the Commission decided to use the breakaway pole (after suitable testing) because they were of the opinion that the extent and severity of potential injury to persons caused by a falling pole or escaped electricity was more than offset by the lessened incidence and severity of injuries to persons, then they would probably not incur liability in negligence.

Counsel is requested to comment on whether the Commission could be liable in negligence for failing to take steps to minimise danger to motorists in respect of a pole which is, or ought to be, a known hazard.

The investigators suggest that the liability of the Country Roads Board or a local council for installing or maintaining a traffic device which, in itself, presents a danger, would be decided on the same basis as the discussion in the section on rigid luminaires. *Counsel is requested to advise whether it is correct to conclude that a Victorian authority could be so liable.*

NOTE: **Space does not permit the inclusion of the attachments to the Brief to Counsel, which comprised two volumes of material. A list of the contents of those attachments is set out hereunder.**

CONTENTS — VOLUME I

(1) Extracts from Fitzpatrick, Sohn, Silfen and Wood, *The Law and Roadside Hazards* (Michie, 1975).

(2) Hricko, "Roadside Hazards — Liability and Responsibility" (1974) *Federation of Insurance Counsel Quarterly*.

(3) Extract from American Law Reports Annotated, "Liability of government unit for collision with safety and traffic control devices in the travelled way", 7 A.L.R. 2d 226.

(4) *De Lahunta* v. *Waterbury* 7 A.L.R. 2d 218.

(5) Extracts from *Highways Act* 23 U.S.C. § 402, and 23 C.F.R. § 1204.4, sec. 12, Highway Safety Program Standard.

(6) Extract from 39 Am. Jur. 2d 855, "Highways, streets and bridges: poles and posts".

CONTENTS — VOLUME II

Extracts from Victorian legislation:

Local Government Act 1958
Country Roads Act 1958
State Electricity Commission Act 1958
Electric Light and Power Act 1958
Road Traffic Act 1958
Road Traffic Regulations 1973

Summary of statutory provisions relating to street lighting in Victoria.

Sample of letters from S.E.C. to motorists who caused damage to power and luminaire poles.

Appendix C

LEGAL IMPLICATIONS OF FRANGIBLE POLES FOR ROAD AUTHORITIES — OPINION

Mr. S. MORRIS

Introduction

The Commonwealth Department of Transport has commissioned an investigation into the legal implications surrounding the use of frangible or breakaway poles. The investigators have concentrated upon street light poles as the principal question, as these have important road safety implications. Considerable information has been collected on the characteristics of rigid vis-a-vis frangible poles — both from within Australia and overseas. Drawing on this information the investigators have analysed the legal situation and have reached tentative conclusions as to the incidence of liability in the event of vehicle/pole collisions. I have been instructed to consider these conclusions and to give my opinions upon the matters raised. I have been supplied with a comprehensive brief, including all relevant statutory material, and information as to the characteristics of various types of poles. I have also been supplied with considerable American material on the question of roadside hazards. In addition I have examined the available Australian and English case law on the subject.

The Facts of the Matter

I accept that the facts of the matter are that breakaway poles have been extensively used in various countries (in preference to rigid poles) and have been found to significantly reduce fatalities, injuries and property damage. The investigators have put together an impressive array of statistics, research findings, and technical opinions in support of this conclusion. I have been totally convinced that breakaway poles are much safer than rigid poles.

The hazard posed by conventional rigid poles is no minor one. A University study has found that collisions between vehicles and luminaire poles in Melbourne account for 12 deaths and 185 injuries each year. The cost of these collisions has been estimated to be in excess of $7m.

The general principle behind frangible poles is that they yield at the base or slip off their foundation on impact, thus presenting very little resistance to the impacting vehicle. Consequently the vehicle decelerates less rapidly than with a rigid pole and damage to the vehicle and its occupants is much less. The most commonly used frangible poles will fall in the direction of movement of the impacting vehicle, although with speeds below 35 km/hr the pole may fall back onto the roadway. Although breakaway poles fall down upon collision there is virtually no evidence of secondary collisions. This possibility must, therefore, be regarded as extremely remote.

The Defendants

Assuming, for the moment, that a negligence action would lie in respect of a collision between a vehicle and a street light pole: who would be the defendants? I have considered the statutory provisions applicable in Victoria and I generally agree with the conclusions expressed by the investigators. The situation is complex and often obscure; but, whatever the circumstances, I believe there will always be a viable defendant which could be sued. The appropriate defendants vary according to the type of road or street.

(a) Residential Streets and Roads

In the case of a normal residential street or road the local municipal council will be the primary defendant. Under the *Local Government Act* 1958 a council has the care and management of all roads within its district (s. 535); it owns all erections upon such roads (s. 551); it has the duty to keep such roads open and free from obstruction (s. 553); it may erect lamp-posts (s. 687); and it may arrange with an electrical undertaker that lamp-posts be erected (s. 687). In my opinion a local council could always be a defendant in an action arising from a vehicle/street light pole collision on these types of roads. Quite apart from owning the pole, the council would have been either directly or indirectly responsible for its erection. Moreover the council is primarily responsible for its maintenance.

The position of the electrical undertaker is more difficult. Usually this will be the State Electricity Commission. (I will use the expression "S.E.C." as including all electrical undertakers.) The practice is that street light poles are erected and maintained by the S.E.C. When a pole is damaged it is repaired by the S.E.C., and the S.E.C. recovers damages from the person causing the damage pursuant to s. 52 of the *Electric Light and Power Act* 1958. Presumably this provision is available as the pole is "under the control of" the S.E.C. In my opinion the S.E.C. does not *own* street lighting poles, but these vest in the local council. In fact the S.E.C. appears to have no power to erect street lamps other than pursuant to a contract with, and with the permission of, a local council. (Section 24(1) of

the *Electric Light and Power Act* 1958 appears to give such a power to an undertaker; but this must be subject to s. 687(2) of the *Local Government Act* 1958.) The power of the S.E.C. in this regard is confined to contracting with the local council for the installation and maintenance of the street lights (using s. 22(1)(b) and s. 102 of the *State Electricity Commission Act* 1958). If such a contract is made (as it invariably is) then the street lights belong to the council, and are there with the council's permission, but are erected by and are under the control of the S.E.C. Does this make the S.E.C. liable in the event of a vehicle/pole collision?

In a negligence action the S.E.C. could be liable for creating and/or allowing a danger to road users. This would be so even if the danger arose from the S.E.C. complying with instructions from a local council. In such a case, however, the S.E.C. would be completely indemnified by the council. The reason why the S.E.C. would be primarily liable is simply because it is reasonably forseeable that negligence on its part could cause injury to a road user. The S.E.C. need not do what it is instructed to. It can decline work that involves negligence.

In practice the reason for joining the S.E.C. would be to obtain discovery of documents, assist in "fishing" expeditions, and provide a "backdoor" method of admitting evidence against the local council (under the guise of admissions against the S.E.C.).

In a public nuisance action the S.E.C. could be liable on the basis that it caused the nuisance. Once again it would be indemnified by the local council. I find it of little assistance to classify the S.E.C. as an occupier. This type of analysis is more akin to *private* rather than *public* nuisance. In public nuisance the person who has created or maintained the nuisance is liable whether an occupier or not; and that person must be indemnified if the nuisance has been created or maintained on the instructions of the body responsible for the nuisance.

(b) Main Roads and State Highways

(i) Lighting below the standard: Local councils can, and do, provide street lighting on main roads and State highways below the standard required for cost-sharing. It is apparently normal practice for councils to obtain the consent of the Country Roads Board before erecting such lights. In my opinion the only provision in the *Country Roads Act 1958* that could be regarded as requiring consent is s. 23(1) — permanent works shall be carried out to the satisfaction of the C.R.B. Presumably the C.R.B. could be "satisfied" *after* street lights were erected; thus prior consent would seem not to be necessary. Once erected the street lights would belong to the C.R.B. (s. 43(2) and s. 74). Clearly, then the C.R.B. could remove any street light pole that was unsatisfactory.
Given this statutory background it is my opinion that the C.R.B. could be joined as a defendant in a negligence or nuisance action, provided it knew or should have known of the existence of the hazardous pole. In other words the mere fact that the C.R.B. becomes the owner of a hazardous pole is not enough; there must be an element of knowledge and unreasonable lack of action.
The position of the local council and the S.E.C. in respect of this type of lighting is the same as for local roads.

(ii) Cost-Shared Lighting: The *Country Roads Act* makes specific provision for "cost-shared" lighting on main roads. In such a case the lighting is required to be of a certain standard; its cost is shared by the C.R.B., local council and S.E.C.; and all three bodies, at some stage, approve the design of the lighting and the plans for its location. The legal responsibility for initiating such lighting, remains with the C.R.B.
In my opinion the C.R.B. could be made a defendant in an action based upon the negligent nature or location of a lighting pole. The S.E.C. would be responsible on the same basis as discussed earlier. A local council might also be joined — as it would have approved the lighting — but it might be more difficult to succeed against the local council as it has no *legal* say in the lighting decision. On the other hand it could be argued that, if a council takes it upon itself to consider whether certain lighting be approved, it owes a duty to road users to exercise responsible care.

(c) Freeways

Freeways are under the direct control of the C.R.B. and it erects and maintains all lighting upon them. Local councils have no power or responsibility whatsoever in respect of freeways. Neither does the S.E.C., although it could do work for the C.R.B. If the S.E.C. did any such work it would be liable for negligence, but would be indemnified by the C.R.B. if the work was done according to instructions. In all cases the C.R.B. could be sued if poles on freeways were of negligent design or location.

Negligence

I have no doubt that road authorities *can* be liable for their negligence in the design and placement of street light poles. The real difficulty is in determining the precise circumstances in which liability may arise. The fact that road authorities *may* be liable is supported by a long line of cases, the most authoritative of which is *Levine* v. *Morris* (1970) 1 W.L.R. 71 (C.A.). But does a "duty of care" exist in all circumstances? And what is the "standard of care" required?

It is convenient to begin the analysis by imagining the position of a private landowner who invites members of the public onto his land. Imagine that entrants use a roadway upon the land, and that there are street light poles placed upon it. In such a situation there is a *duty* of care on the landowner to ensure that the design and location of the poles are safe. The exact *standard* of care (that is, the degree of care that is necessary to satisfy the duty) will vary according to the class of entrant: whether a contractual entrant, invitee, licensee, or trespasser. Although the standard will vary, there is a common thread: what is "reasonable" having regard to all the considerations.

What, then, is the legal position of statutory authorities? In *Levine* v. *Morris* the Court of Appeal

proceeded on the basis that there would always be a *duty* of care, and the question in any case would be whether a reasonable *standard* of care had been taken. This approach has considerable intellectual appeal. It accords with the general trend in the law of torts to determine liability on the basis of the standard of care, rather than eliminating any possible liability by saying there is no duty of care. The conventional means of deciding whether there is a duty of care is to ask: "Can I reasonably forsee that carelessness on my part would be likely to injure some other person?". In the case of the design and placement of street light poles, it would always be forseeable that carelessness could cause injury to road users. The annual road toll from vehicle/pole collisions bears witness to this.

The simplicity of this analysis is affected by judicial decisions which give an immunity to certain actions taken pursuant to statutory provisions. These decisions hold that a statutory authority only has a duty of care in certain circumstances. The leading case is *Anns* v. *London Borough of Merton* (1977) 2 W.L.R. 1024 (H.L.). This case stands for (at least) two propositions:

(i) a common law duty of care will be more readily imposed upon a public authority in respect of "operational" decisions than "policy" decisions; and

(ii) a duty of care may arise whether the authority is exercising a statutory power or performing a statutory duty — although "in the case of a power, liability cannot exist unless the act complained of lies outside the ambit of the power" (per Lord Wilberforce).

These last words are apt to give rise to logical difficulties, and, in my opinion, are best interpreted to mean "outside the ambit of the discretion vested in the authority". This interpretation is supported by Lord Wilberforce's analysis — for example, when he states:

> "A plaintiff complaining of negligence must prove, the burden being on him, that action taken was not within the limits of a discretion *bona fide* exercised, before he can begin to rely upon a common law duty of care" (p. 1035).

In my view the Victorian statutory provisions give *powers* in respect of street lighting and do not impose *duties*. Section 687(2) of the *Local Government Act* states that a local council *may* provide such lamp-posts as it thinks necessary. Section 72B(a) of the *Country Roads Act* looks like a statutory duty at first sight, but is so hedged with discretionary elements to make it equivalent to a power. In any event the balance of s. 72B is cast in terms of power.

The combination of the statute law and the case law leads me to the view that road authorities will not owe a duty of care to motorists in making a decision about the design and placement of street light poles whenever the decision can be properly characterised as a "policy" decision; but they will owe a duty of care in the "operational" sphere. It will often be difficult to make the distinction, but, in my opinion, the law requires such a distinction to be made. In any event, even if I am wrong about this duty of care question, much the same result ensues: even if a duty existed in *all* circumstances, the necessary standard of care would be met in most instances if the pole was in accord with the authority's policy.

The result is that if an authority makes a policy decision to use frangible poles (or rigid poles) it will not be liable to persons who are injured as a result of this choice (putting aside, for the moment, the question of the placement of poles). Moreover if the poles are *placed* in accord with a clear policy (whether formally adopted or not) then liability would not arise as a result of pole placement in accord with the policy. However if the authority has no unequivocal policy (whether by formal adoption or long practice) or if the design or placement of the pole is not in accord with the policy, then the authority will be liable for any negligence. That is, the authority will be liable for failing to take reasonable care for motorists and others who may be injured, taking into account current scientific knowledge. An example where liability would arise is where an authority placed a rigid pole on the outside of a bend in a highway in a dangerous position and not pursuant to a specific policy concerning the placement of rigid poles in such positions. The standard of care in such circumstances would be the care that could be expected from a reasonably competent road engineer weighing up all the conflicting considerations, and coming to a conclusion upon them: see *Levine* v. *Morris*. Thus if there were alternative poles and three possible locations (i.e. six possible choices) it may be that a competent road engineer would regard four choices as safe and two as dangerous. In such circumstances the authority need not make the *best* to avoid liability; it may choose any of the four "safe" choices.

The adoption of a policy, however, will not give an authority blanket protection from legal action. For an authority to be protected the policy must be based on relevant considerations; and the pole in question must be one to which the policy can legitimately apply. Let me expand on these two propositions.

A policy (for example) to use rigid poles on the border of all carriageways would not be legitimate if it were adopted for an extraneous reason ("the Shire President owns a saw-mill") or in blind ignorance of relevant and well-known facts ("many people die from vehicle/pole collisions"). But the policy need not be right, nor wise, nor far-sighted in order to protect the authority from legal action. The only criteria is that it must be based on relevant considerations. These obviously include safety factors; but other matters such as cost, convenience, and durability will be relevant. If an authority adopts a policy concerning the placement of, say, luminaire poles, it would be legitimate to weigh lighting factors against the hazard factor. In other words there is a recognition that authorities must make discretionary choices — weighing up conflicting considerations. Provided such choices are made in a legitimate way, the authority is given legal protection.

The second proposition mentioned above — that the policy must apply to the pole in question — may seem self-evident. Yet I suspect that this may become an area of debate. I can imagine an authority adopting a policy to use rigid poles, but having no policy on the

placement of poles. In such a case the authority would owe a duty of care in the placement of these rigid poles. In other words it would be liable for the placement of a pole if reasonably competent road engineers, confined to using rigid poles, would regard such placement as unsafe.

I simply note one other aspect. There will inevitably be arguments about causation; but these will usually come down to an apportionment based on the degree of fault shown by the respective parties.

Negligence — Hypothetical Situations

The investigators have posited four hypothetical situations (the details of which I need not repeat here).

(i) I agree with the investigators' reasoning and conclusions.

(ii) I agree with the investigators' reasoning and conclusion. As the prevailing urban speed limit is 60 k.p.h. the position of the road authority is even more secure in real life.

(iii) I agree with the investigators' conclusion. I am of the opinion that the C.R.B. would only be liable if a competent road engineer would not have placed a rigid pole in that position; and if there was no *overriding* C.R.B. policy which had been complied with.

(iv) I agree with the investigators' reasoning and conclusions, subject to my comments above.

Negligence — A Summary

In my opinion authorities such as the C.R.B., S.E.C. and local councils:

(i) *could* incur liability for maintaining a rigid pole which is impacted by a motorist causing injury or damage whenever the pole was placed in a dangerous position which would have been avoided by a reasonably competent road engineer; and

(ii) *could not* incur liability for maintaining a break-away device which, on impact, falls and injures a pedestrian or motorist as there is abundant statistical and other evidence to show that this occurrence would be extremely remote.

Public Nuisance

It has been suggested that road authorities might be liable for damage arising from collisions with dangerous poles under the common law of public nuisance. This branch of law is a hangover from the past; it is rarely used these days; and it is somewhat obscure. There are, however, a number of older cases where public nuisance was used to provide a remedy to persons injured as a result of a collision with an obstruction on the highway. Most of these cases were decided before the development of the common law of negligence as exemplified in *Donohue* v. *Stevenson* (1932) A.C. 562. A striking example of the decline of public nuisance is given by *Levine* v. *Morris*, where the case proceeded entirely on negligence and no mention was made of nuisance whatsoever. In my opinion the courts will continue to approach such matters on the basis of negligence, rather than attempt to resuscitate public nuisance as a remedy. It is true that public nuisance has been used extensively in the United States, especially in respect of roadside hazards. But the American branch of the common law separated from the Commonwealth branch many years ago and there are numerous areas in which the two branches have gone separate ways. In any event I agree with the investigators that the U.S. textbooks overstate the availability of the remedy even in the U.S.

Despite the foregoing, it seems clear enough that the placement of a pole on a roadway, *without* statutory authorisation, constitutes an actionable public nuisance: *R.* v. *United Kingdom Electric Telegraph Co. Ltd* (1862) 9 C.C.C. 174. Thus an authority could be liable for damage arising from a collision with an unauthorised pole: such as a pole placed by Council X in Municipality Y (unless it was done as agent for Council Y).

I agree with the investigators, however, that statutory authorisation is a defence to an allegation of public nuisance. Thus guide posts placed beside a road by a municipal council are not an actionable nuisance: *Birmingham* v. *Shire of Berwick* (1883) 9 V.L.R. 344. Neither are tramway wires erected pursuant to statutory power: *Fullarton* v. *North Melbourne Electric Tramway and Lighting Co. Ltd* (1916) 21 C.L.R. 181. And, likewise, neither would street light poles erected by a local council or the C.R.B. pursuant to statutory power.

But could it be said that particularly dangerous poles are authorised by statute? If a local council can light a road in a safe way, or in a dangerous way, are *both* ways authorised by statute? *Fullarton's* case stands for the principle that a nuisance created pursuant to statute is authorised provided it is the necessary consequence of the proper exercise of the statutory powers. Sometimes it is suggested that a nuisance must be the *inevitable* consequence of the authorised undertaking: see, for example, the discussion in J. G. Fleming, *The Law of Torts*, 5th ed., pp. 422-424. In my opinion this test is too stringent. Rather a nuisance is authorised if it is done within the powers given by statute — even if the powers have been exercised negligently. Consequently the scope for an action based on public nuisance is narrower than that based on negligence; and it will only be in the rare instance that a nuisance action could be brought when a negligence action could not.

My opinion is reinforced by the relevant statutory provisions in Victoria. A council must keep its roads free from obstruction: *Local Government Act*, s. 553(1). It may erect statutes, seats, or fountains, or plant trees, "without unduly obstructing the thoroughfare": s. 555(1). But its power to erect lamp-posts (s. 687(2)) is a power to do things "as the council thinks necessary"; and it is a power not specifically limited, as is the power in s. 555(1). There is, therefore, an acknowledgement that sometimes an authorised lamp-post may cause an obstruction; but, presumably, the good outweighs the evil.

The situation in the case of the C.R.B. is similar. The power to erect street lights (*Country Roads Act*, ss. 22, 72, 72B, 112B) is not subject to any limitation concerning obstruction; compare the power to erect

structures for protecting pedestrians or regulating traffic which must be done "without unduly obstructing the thoroughfare" (s. 113A). Moreover the C.R.B. is empowered to carry out "permanent improvements" (s. 22) which are defined (in s. 3) to include, *inter alia*, street lights which are "in the opinion of the Board calculated to increase the utility safety capacity or amenities of the road". In my opinion these provisions authorise the C.R.B. to erect street light poles which would be nuisances at common law.

In summary, I believe there is little scope for actions based on nuisance. I agree with the tentative conclusion of the investigators.

Utility Poles, Sign Posts and Traffic Control Signals

These sorts of poles also constitute serious traffic hazards: especially cable supporting poles. Various safer alternatives are possible. In the case of utility (S.E.C.) poles the main alternatives are relocation of dangerous poles or undergrounding of electricity cables. A breakaway pole has been invented, but it is still in the experimentation stage. In the case of sign posts, it is a simple matter to make the post frangible. Traffic control signals pose greater problems, but can be made frangible in some instances, or be supported by overhead wires instead of poles.

First I am asked to advise upon the potential defendants in these situations. Second I am asked to advise on the question of liability.

S.E C. Poles: in my opinion the S.E.C. is clearly a potential defendant as it is responsible, in its own right, for erecting and maintaining these poles. The question arises, however, whether a local council or the C.R.B. might also be a potential defendant on the basis of technically *owning* all poles on their roads. In my opinion the road authorities would not be potential defendants, as their ownership of S.E.C. poles does not carry with it any real rights over them. This is because the poles are also owned by the S.E.C., and the S.E.C. has power over them. In the event of a conflict between owners the *specific* power of the S.E C. will override the *general* powers of the road authorities. If a road authority gave permission for the erection of an S.E.C. pole (although I can find no provision requiring such permission), then it might open the door to it being liable if the pole would be hazardous. But I believe that it would be highly unlikely that the road authority would be ultimately held liable.

Sign Posts and Traffic Control Signals: I agree with the conclusions expressed by the investigators that the "responsible" authority would be a potential defendant in the event of a collision with any of these structures.

Liability: In my opinion the analysis in respect of street light poles applies to utility poles, sign posts, and traffic control signals. I agree with the conclusions reached by the investigators, both in respect of utility poles, and traffic signs and signals.

Conclusion

In many respects the law of torts is an unsatisfactory way of compensating those who are injured or who suffer loss in the course of their daily lives. But one of its redeeming qualities is that it encourages safe conduct by penalising those who are negligent. In doing this the law is not guided by fanciful and theoretic notions of what is and what is not safe; rather it is guided by common sense and practical experience. Thus, if road authorities wish to avoid liability for road accidents, they should also look to common sense and practical experience. Road authorities should not baulk at safer road furniture because of a fear of the legal consequences.

Stuart Morris

Equity Chambers
7 November 1979

Appendix D

LEGAL IMPLICATIONS OF FRANGIBLE POLES FOR ROAD AUTHORITIES — OPINION

Mr. W. C. LEE, Q.C.

The Crown Solicitor,
Attorney-General's Department,
P.O. Box 367,
CANBERRA CITY, A.C.T. 2601

Dear Sir,

Querist has conducted a research project for the Commonwealth Department of Transport into legal implications surrounding the use (or non-use) of certain frangible or breakaway poles by road and/or electricity supply authorities, with particular emphasis upon luminaire (street lighting) poles. In accordance with instructions contained in letters dated 4th July, 1979 and 20th November, 1979, and from various conferences, advice is sought with respect to the likely possible legal situation in Queensland on two specific questions:

(a) Would such an authority (identifying likely defendants where possible) be held liable if that authority used a frangible or slip-base rather than a rigid luminaire pole for lighting a road and, as a result of a motor car/pole collision, a motorist, pedestrian or property-owner were injured by the falling pole?

(b) Would such an authority be held liable when a frangible or slip-base luminaire pole was not used, but could have been used, and the rigid pole exacerbated the damage incurred by a motorist or passenger?

Various authorities have indicated concern that the use of the relatively new frangible or breakaway poles would expose them to increased legal liability by increasing the risk of accident, whereas they were of the view that they would incur no liability if they continued to use the existing rigid poles, based upon the notion of non-feasance. However, breakaway luminaire poles have been extensively used in various countries and in some States of Australia, and have been found to significantly reduce fatalities, injury, and property damage when a collision occurs between such a pole and a motor vehicle. In terms of all fixed object collisions, research has shown that rigid luminaire poles, whether made of steel, concrete or timber, rate near the top in terms of accident severity because they are rigid, causing a vehicle to decelerate rapidly, resulting in severe damage to the vehicle and secondary injury and often death to its occupants.

Various studies, including a university study in Victoria, have shown that such collisions are frequent and serious, resulting in extensive losses to those directly involved and to the community in general. The authorities involved, therefore, are or should be aware of the consequences involved by the use of rigid poles. After all, the gravity, frequency and imminence of the danger to be provided against comprise, as Dixon J. pointed out in *Mercer* v. *Commissioner for Road Transport and Tramways* (1936) 56 C.L.R. 580 at p. 601, the first questions for consideration.

A frangible pole, on the other hand, yields at the base or slips off its foundation on impact, thus presenting very little resistance to the impacting vehicle which passes through the pole with minimal deceleration. There are various types of breakaway poles, the slip-base type being most commonly used. Research has also shown that collisions with breakaway poles rarely result in an injury to anyone, that damage to the vehicle is drastically less, and that falling poles behave in such a way that injury to other property or persons is very unlikely. Any such injury or damage is therefore regarded as extremely remote.

It is perhaps timely to refer to the remarks of Latham C.J. in *Mercer* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1937) 56 C.L.R. 580 at p. 589:

> "The mere fact that a defendant follows common practice does not necessarily show that he is not negligent, though the general practice of prudent

men is an important evidentiary fact. A common practice may be shown by evidence to be itself negligent. A jury is entitled, for example, on sufficient evidence, to find that a proper regard for the safety of other people would require the adoption of some precaution which has only recently been discovered. But a jury is entitled only so to find if there is actual evidence to that effect. A jury cannot disregard the evidence and find, merely on its own motion, that some precaution which would have prevented injury in a particular case ought to have been adopted."

There is no reason why this principle of itself should not be of relevance to the issue of whether frangible poles and not rigid poles should be used, if other factors necessary for sheeting home liability exist. The apprehension expressed by various authorities takes on the appearance of "a tiger by tail" fear which ought to be dissipated or minimised by dissemination of information. The fear seems to be that notwithstanding that rigid poles are hazardous and cause real damage to road users and property owners, the use of frangible poles might impose more liability on the authorities and more injury to others. From the available evidence, it is submitted that such a fear is not well based.

For the purpose of this discussion, the facts outlined above relating to the behaviour of various types of poles are taken as being capable of acceptable proof in a court of law. Some evidence of the cost of each type will also be of relevance.

It is assumed that street lighting serves not only to light the streets for the purposes of facilitating the safe movement of traffic, both vehicular and pedestrian, at night or in other times of poor visibility, it also serves to illuminate parked cars, signs, islands, hazards and such matters. Another purpose, as a function of Local Government if by-laws are made therefor, is to provide for promoting and maintaining the "peace . . . comfort . . . health . . . morals . . . welfare, safety, convenience, housing, trade, commerce of the area and its inhabitants . . . and for the planning, development, and embellishment of the Area, and for the general good rule and government of the Area and its inhabitants".

There are further numerous specific powers given to a Local Authority which apparently do not depend upon the making of the by-laws and ordinances: see *Goulburn City Council* v. *Carey* (1975) 32 L.G.R.A. 277. These include the undertaking, provision, construction, maintenance, management execution, control, regulation and/or regulation of the use of "roads . . . traffic, health, supply of light and power; town planning; sub-division of land; opening, closing, aligning, widening, altering and grading of roads; . . . and generally all works, matters and things in its opinion necessary or conducive to the good rule and government of the Area and the well being of its inhabitants". This would seem to include aids to the prevention and detection of crime of any sort, e.g. shop or housebreaking, robbery, assault and so on, and also the general well-being and safety of citizens.

Some initial observations should be made before the questions raised are considered. It is of course well known that street lighting is commonly fixed to cable-carrying poles and that there are many poles used for more purposes than one by various authorities in co-operation e.g. road and traffic signs and signals, lighting, power and telephone cables etc. Nevertheless, advice is specifically requested in relation to luminaire poles pure and simple, i.e. poles which carry street lighting and nothing else. This advice is accordingly limited to situations where there are such luminaire poles only. It may not be possible however, to entirely ignore the existence of other such utility poles or a mix of various types in all factual situations which could conceivably arise.

It should also be observed that apart from some simple hypothetical examples, the advice sought is necessarily of a general nature, without a detailed specific fact situation which exists in the case of any particular collision, and without precise details of the actual background leading up to the installation of particular street lighting, and without information as to whether ss. 293 and 444 of the *Electricity Act* 1976-1979 have been invoked. Such circumstances may vary indefinitely and may have a vital bearing on the outcome of any given situation in which liability is sought to be invoked. Accordingly the views here advanced in relation to the questions raised may require modification in a particular case.

Within the above framework, it is necessary to approach the problems raised on two broad bases:

1. Which statutory authorities are potential defendants in the situations envisaged?
2. What liability, if any, might be imposed on those defendants, or any of them, in such situations?

1. *POTENTIAL DEFENDANTS*

Given that a good cause of action exists in appropriate circumstances, this question primarily involves an examination of the statutory provisions relating to ownership and control of roads, and ownership and control of street lighting poles. As the question of fixtures was raised by querist, it will also be necessary to consider who owns the soil of the roads. In a particular case the enquiry would also involve an examination not only of the status of the actual road involved itself, but also the actual arrangement, if any, existing between road authorities, or between road authorities and electricity authorities as to the installation of street lighting, both as to design, location, and maintenance of it. No specific instructions have been provided in relation to any such arrangements, although some general understanding of the position has been given.

(a) *What is a Road?*

The term "road" is defined in certain statutes, with varying degrees of detail, the central feature being that it be *dedicated* to the public, or to public use. See e.g. s. 3 of the *Local Government Act* 1936-1978, s. 2 of the *Main Roads Act* 1920-1976, s. 5 of the *Land Act* 1962-1978.

By s. 6 of the *Electricity Act* 1976-1979, however, the word "dedicated" is not used in the definition "road", the essence being "any road, street, square, court, alley, highway, thoroughfare, lane, footpath, public passage, or place that the public are entitled to

use". There is no reason why this would not apply to roads through privately-owned places of entertainment, amusement, recreation or business, e.g. parks, zoos, drive-in theatres, shopping complexes and others. The definition includes any wharf, jetty, bridge, park or reserve that is under the control of a public body. Such places would be "roads" under the *Traffic Act* 1949-1977 (s. 9), which makes no mention of dedication, but rather to the fact that they be "open to or used by the public or to which the public have or are permitted to have access whether on payment of a fee or otherwise".

An Electricity Authority has the *power* under sub-s. 174(1) to construct, maintain and control works on *any* road (as defined in s. 6 of the Act) for the purpose of lighting, subject to certain consents referred to subsequently, but sub-s. 174(2) throws a doubt on the apparently broad definition, at least insofar as it relates to the street lighting power, because it provides that the Electricity Authority *may* (on its own volition) provide *such* lighting (i.e. as in sub-section 1) for the purpose of lighting any of its works, *or* on the requisition of the Commissioner of Main Roads, or Local Authority or any other statutory body having control or management of a road. It apparently does not have the power to provide general street lighting, except on the requisition of one or other of the authorities mentioned.

It is not known whether an Electricity Authority places street lighting on a private road for the purposes of lighting any of its works. It appears that the Commissioner of Main Roads or a Local Authority would not have the power to request the construction of "street lighting" on a private road (which the public are entitled to use), as it is not a road under their control, and if street lighting were installed by an Electricity Authority on any such private "road" the owner of the land (and perhaps the Electricity Authority) would be the likely defendants on ordinary principles applicable to occupiers of land or on ordinary principles of negligence.

But the Electricity Authority clearly has the power to erect street lighting on *any* road, as defined in s. 6, on the requisition of the Commissioner of Main Roads, or Local Authority, or any other statutory body having control or management of a road. Not all of those roads are necessarily dedicated roads, but at least for the purposes of the *Electricity Act* 1976-1979 they must be roads "that the public are entitled to use". Some of the possibilities are noted subsequently.

(b) *Who Owns the Land Below the Road?*

Querist raised the question of whether or not the poles when erected became fixtures. This involves not a question of who owns the "road", but who owns the soil *under* the road.

It appears that the property in all *land* which has been *dedicated* to public use as a road in Queensland, whether Crown land or not, vests in the Crown: see s. 369, sub-s. 362(4) of the *Land Act* 1962-1978, sub-s. 34(14) of the *Local Government Act* 1936-1978 in conjunction with s. 119 of the *Real Property Act* 1861-1978 and sub-ss. 13(3) and 17(1) of the *Main Roads Act* 1920-1976. See also sub-s. 35(10) of the *Local Government Act* 1936-1978. My attention has not been drawn to any provision, nor has any been located, which vests the ownership or fee simple of land *dedicated* for public use as a road, in a Local Authority or in the Commissioner of Main Roads (or in any other authority) similar to those provisions considered by the Court of Appeal in New South Wales in *Commissioner for Main Roads* v. *B.P. Australia Ltd* (1964) 65 S.R. (N.S.W.) 2333. See also *21 C.T.B.R. (N.S.)* Case 11, 137 at p. 141.

However, land which a Local Authority may resume for roads pursuant to powers given by s. 30 and sub-ss. 35(7) and (10) of the *Local Government Act* 1936-1978 and ss. 10 and 12 of the *Acquisition of Land Act* 1967-1977 vests in the Local Authority, presumably until it is dedicated to public use. The requirement for such dedication would seem to be implied by the *Local Government Act* 1936-1978, in which case, s. 369 of the *Land Act* 1962-1978, being of apparently general application to lands dedicated by persons (other than the Crown), vests the ownership of the *land* in the Crown. Until it is dedicated, however, ownership of the land, the subject of the "road" is in the Local Authority. In the case of a new sub-division, it is the owner of the land who dedicates new roads to the public: sub-s. 34(14) and s. 119 of the *Real Property Act* 1861-1978.

Likewise under the *Main Roads Act* 1920-1976, all roads the subject of the Act are similarly roads dedicated to the public use (s. 2) or in the case of a new road, sub-s. 13(4) provides that it be a declared road and absolutely dedicated to the public use from a certain date. The Commissioner of Main Roads is also a Constructing Authority under the *Acquisition of Land Act* 1967-1977, with powers of resumption under that Act and the *Main Roads Act* 1929-1976. Being declared a road, sub-s. 17(1) operates to vest ownership of the land in the Crown.

In the absence of any instructions to the contrary, the assumption therefore is that ownership of all *land* which has been *dedicated* to public use as a *road*, vests in the Crown, and not in the Local Authority, the Commissioner of Main Roads, or in any other authority. This aspect will again be referred to below when considering the position of those authorities as possible defendants.

It has not been suggested that any liability attaches to the Crown as owner of the freehold, for the activities conducted upon Crown land by statutory authorities. The powers to construct and maintain roads and street lighting are not exercised by them as delegates of the Crown, nor as licensees of the Crown as derived from the Crown ownership of the soil. They are statutory powers to do certain acts and construct certain works, conferred directly by the legislature. *Metropolitan Water Supply and Sewerage Board* v. *R. Jackson Limited* [1924] St.R.Qd., 82 at p. 101.

(c) *Possible Miscellaneous Defendants*

The authorities which primarily construct and/or exercise control over roads on which there may be street lighting, are Local Authorities (including the Brisbane City Council — "the Council") and the Commissioner of Main Roads, and attention will later

be concentrated on these authorities. It does not follow, however, that all "roads" on which there could be luminaire poles, are under the control of these two authorities. See the reference above to the definition of "road" in s. 6 of the *Electricity Act* 1976-1979 and sub-s. 174(2).

Also by sub-s. 4(10) of the *Local Government Act* 1936-1978, the Governor in Council may by Order in Council declare that this Act shall not apply and extend to such part of the Area of the Local Authority as is defined in the Order, which in turn may later be revoked. "Area" is defined in s. 5, and is dealt with in detail in s. 5. Such an exclusion could operate e.g. when part of an Area of a Local Authority is required for some public works or undertaking, and there *could* be street lighting in such Area.

One example of this may be provided in the *Irrigation Act* 1922-1978 where an irrigation area or undertaking may be constituted. The land may be exempted from the *Local Government Act* 1936-1978. Indeed, s. 10 of the *Irrigation Act* 1922-1978 constitutes the irrigation area of a Shire under the *Local Authorities Act* 1901 (then applicable) whereupon the land shall be excluded from the area or areas of the Local Authority which shall cease to have jurisdiction over the land. The Commissioner for Irrigation and Water Supply shall constitute the "shire" pursuant to the section. There may have been street lighting on the land before its exclusion from the *Local Government Act* 1936-1978, or it might be installed by the Electricity Authority, on the requisition of "the statutory body having control or management of the road": sub-s. 174(2).

Reference should also be made to ss. 362 and 370 of the *Land Act* 1962-1978. The Minister may, with the approval of the Governor in Council, declare any Crown land open as a road for public use and such land shall thereby be dedicated as a road accordingly. Sub-s. 362(4) provides that the ownership of land comprised in all such roads shall be and shall remain vested in the Crown. By s. 370, the Minister has the power to form, construct and maintain roads serving lands made available or to made available for lease or sale under the Act or any other Act.

By sub-s. 370(3) of the *Land Act* 1972-1978, the Governor in Council may, at any time after completion of the construction of any road constructed by the Minister pursuant to that section, fix a date on and after which the provision of the *Local Government Act* 1936-1978 shall apply to the road. On and after that date the Minister shall not be subject to any duty, obligation, liability or responsibility whatsoever in respect of the road (his rights and liabilities are set out in sub-ss. 370(1) and (2)), and the *Local Government Act* 1936-1978 thereafter applies in respect of the road as if it had been constructed by the Local Authority in the area in which it is situated. By sub-s. 370(4), the *Local Government* 1936-1978 does not apply to such a road until that date is fixed by the Governor-in-Council by Order in Council.

There is nothing to prevent the construction of street lighting on such a road by an Electricity Authority before the *Local Government Act* 1936-1978 applies to it, "for the purposes of lighting any of its works" or on the requisition of the Minister if the Governor in Council makes regulations under sub-s. 370(2) of the *Land Act* 1962-1978 conferring upon the Minister any right, power, privilege, etc. relating to roads, had by a Local Authority. In such a case the Minister may requisition the Electricity Authority under sub-s. 174(2) to install street lighting, and accordingly the Minister has the same duty, obligation, liability or responsibility of a Local Authority: sub-s. 370(1). The Minister may be a defendant in an appropriate case.

Another example could operate in a particular case. Local Authorities may in certain circumstances undertake joint obligations with an adjoining Local Authority or Authorities with respect to certain roads, bridges, etc. particularly on the border or boundaries of the shires, and certain obligations can be undertaken by a Local Authority outside its area. In such a case, a Local Authority, other than or in addition to the Authority in whose area the street lighting is situated, may be a proper defendant.

There are doubtless other statutory provisions which may require examination in a particular case. Other possibilities may relate to tourist roads, harbour board areas, national parks and the like. The above is not intended to be a catalogue of all possible defendants. Details of all such statutory provisions have not been provided, nor are all possible factual situations known.

These examples merely illustrate that in a particular case, considerable care is necessary to examine the status of the actual "road" and who controls it, and of any arrangements existing between the various authorities before possible defendants are selected.

Subject to these remarks, attention will be concentrated on the position of Local Authorities, the Commissioner of Main Roads, and Electricity Authorities.

(d) *Principal Defendants*

Local Authorities, Commissioner of Main Roads, and Electricity Authorities.

This involves an examination not only of the *Local Government Act* 1936-1978 but also the *Electricity Act* 1976-1979 which expressly recognises the rights and obligations of the Commissioner of Main Roads and Local Authorities, and the *Main Roads Act* 1920-1976.

Section 30 of the *Local Government Act* 1936-1978 and s. 36 of the *City of Brisbane Act* 1924-1977 give extensive powers to a Local Authority (which term includes the Council) as to the functions of Local Government. It is charged with the "good rule and government of the whole or any part of the Area . . ." It has extensive powers to make by-laws (or ordinances) for "the peace, comfort, culture, education, health, *safety*, convenience . . ." of the Area and its inhabitants. It has specific powers as to "the undertaking, provision, construction, maintenance, execution, control, regulation, and/or regulation of the use of . . . roads, . . . supply of light and power", and very many others, including generally all works, matters and things in its opinion necessary or conducive for the good rule and government of the Area and its inhabitants. These powers can apparently be exercised without an ordinance or by-law.

The *City of Brisbane Act* 1924-1977 is nearly identical, but the express provision as to the supply of light and power was deleted by the *Electricity Act* 1976-1979, First Schedule, Part C.

The power to construct (and control and maintain) roads is thus expressly given to Local Authorities and the Council. The power to construct street lighting in connection with the roads seems to be an implied power, or a power incidental to the "road" power, or it may fall within the general powers to do all works, matters and things in its opinion necessary or conducive to the good rule and government of the Area and its inhabitants. Also in the case of Local Authorities, the power to supply "light and power" probably also includes the supply of light to the users of roads generally. Possibly the Council has by the second paragraph of sub-s. 36(3) of the *City of Brisbane Act* 1924-1977, a similar power, although it is enough to regard this power as an incident of the "road" power, and this is expressly recognised in sub-s. 174(3) of the *Electricity Act* 1976-1979 which provides that nothing in s. 174 shall prohibit the Commissioner of Main Roads, a Local Authority (including the Council) or a statutory body having control of a road "from constructing and maintaining lighting as part of the works comprising such road or part of a road".

It is strange, however, that this is an implied power, as Dixon C.J. and Williams J. in *Thompson* v. *Bankstown Corporation* (1952) 87 C.L.R. 619 at p. 625, made comment. Nevertheless, the power is there, subject to s. 174 of the *Electricity Act* 1976-1979.

Sub-section 32(4) further recognises the power. It provides as follows:

> "The Local Authority may contribute towards the capital cost of street lighting and its installation within the Area of the Local Authority in accordance with an agreement entered into between the Local Authority and any person, body or authority undertaking the supply of electricity within such area."

Section 174 of the *Electricity Act* 1976-1979 seems to be the only *power* given to an Electricity Authority to construct, maintain, and control works on any road for the purpose of lighting. Sub-s. 174(2) enables the provision of it by that Authority on its own volition for the purposes of lighting any of its works. Otherwise it appears that it must be on the *requisition* of the Commissioner of Main Roads, or Local Authority (or other statutory body having control or management of a road). It apparently does not have the power to erect street lighting as it sees fit. The Commissioner, or Local Authority or other statutory body therefore *causes* the street lighting to be brought onto roads they control, or otherwise they have the power to provide it themselves. The Electricity Authority, however, does not seem to be *obliged* to install street lighting on requisition.

It appears that this process, when read with sub-s. 32(4) of the *Local Government Act* 1936-1978, is the basis of agreements entered into between an Electricity Authority and a Local Authority. Precise details of any such agreement are not known, but it is understood that in the case of a new sub-division and new roads, the Local Authority requests the provision of street lighting whereby an agreement is entered into under which the Local Authority contributes an annual sum which covers amortisation of capital cost, plus energy cost and maintenance cost. Sub-s. 34(4) empowers the Local Authority to contribute towards the capital cost of street lighting and its installation. No other provisions have been drawn to my attention, so it is assumed that the agreements thought to be applicable are duly empowered by statute. Presumably similar agreements exist with the Commissioner of Main Roads and other relevant road authorities.

Likewise with street lighting existing at the commencement of the *Electricity Act* in 1976. It is understood that similar agreements operate. If this is the position, the Local Authorities, the Commissioner of Main Roads and other authorities are apparently assuming an obligation to *maintain* the street lighting, as well as to contribute to energy costs and capital costs. They also *cause* new street lighting to be installed and presumably they caused subsisting lighting to be installed. As they contribute towards the cost, presumably they may have a say as to the design, appearance and location of it, hence the importance of the actual agreement. In addition, they can erect their own street lighting if the Electricity Authority does not do so: sub-s. 174(3).

Querist has instructed that there are no by-laws or ordinances made by a Local Authority or the Council, or regulations under the *Main Roads Act* 1920-1976, as to the actual standards or construction or maintenance of roads, or as to the provision of street lighting or as to the specifications thereof, similar to the by-laws made by the Mertons London Borough Council and dealt with in the case of *Anns and Others* v. *Merton London Borough Council* [1978] A.C. 728. In that case the power to make by-laws having been duly exercised (whereupon they became the law on the subject) those by-laws assumed considerable prominence because it was alleged that the Council failed to cause compliance with those by-laws.

It appears from pages 752, 753 of the report that the by-laws were an extensive code providing amongst other things, detailed requirements as to the foundations, as well as the right to inspect. These provisions had to be complied with by a builder, the question being the extent to which the Council may be liable (if at all) for failing to inspect and to ensure that the builder duly complied with the by-laws (and plans). Indeed, the failure of a Council's officers to ensure that approved plans complied with the Council's by-laws is an important matter and was a reason why a Council was held liable in negligence in *Voli* v. *Inglewood Shire Council* (1962) 110 C.L.R. 74 at p. 100. No such situation seems to exist in the current problem.

Section 258 of the *Electricity Act* 1976-1979, requires that the Electricity Authority shall cause its works to be designed, constructed, maintained and recorded in the manner prescribed. "Works" include electric lines, lamps, fittings and so on and would include poles. An examination of the *Electricity Regulations* 1977 shows that Part II deals with Design, Construction and Maintenance of Electric Lines and Works (regs. 6 to 33). These deal principally with high voltage lines, earthing, protective measures, avoidance of damage from electric shock and certain other matters not apparently related

to the design or placement of poles for street lighting, but this is a matter for engineering advice. Any breach of such regulations would of course give rise to an action based upon negligence or a breach of statutory duty. But the only apparent regulation as to street lighting (and this assumed for the purpose of this advice) is regulation 33 which provides:

> "Light on Roads. An Electricity Authority shall ensure that lights used for lighting on a road are installed so that no part of the light or its fittings or its supports to a pole are less than 5.5 m above the carriageway of a road."

This regulation deals only with minimum height above the carriageway of a road, of a street light or its fittings or its support to a pole. Whilst recognising the *existence* of poles and the fact that street lighting is above the carriageway of a road, it says nothing as to the design or location of poles. It also probably relates only to street lighting installed by an Electricity Authority or used for street lighting if installed at the commencement of the Act in 1976. It probably does not apply to street lighting which the Commissioner of Main Roads, a Local Authority, or other statutory body may install pursuant to their respective statutes as part of a road if the Electricity Authority does not install it (sub-s. 174(3)), unless the Governor in Council exercises the powers under s. 293, which could be of relevance to the problem. It is assumed that such powers have not been exercised.

Section 444 of the *Electricity Act* 1976-1979 empowers the Commissioner to publish, with the approval of the Governor in Council, uniform practice manuals in relation to works, providing for the practices with respect to construction and maintenance of works of an Electricity Authority. It is not known if any such manual exists, or what effect it may have on standards. It will be assumed that none exists, and that no standards have been adopted under s. 440.

Thus as presently advised, the position seems to be that there is no relevant statutory prescription or standard dealing with the design or location of poles for street lighting or of roads, although the provision of roads and street lighting is generally authorised by statute. It also seems clear that both topics are *powers*, not *duties*, under any of the above legislation.

Section 35 of the *Local Government Act* 1936-1978 provides for the classification of roads, but nothing would appear to depend upon the various classes of roads under the control of the Local Authority for the purposes of this advice. Reference has been made to the specific *power* in sub-s. 35(7) as to the making of new roads by a Local Authority, and s. 34 deals with new roads created by way of sub-division of lands and dedication thereof by the owner with the consent of the Local Authority.

Sub-section 32(1) provides as follows:

> "The materials of all roads, bridges, ferries, wharves and jetties, and other public works under the control of the Local Authority, and all things appurtenant thereto, shall belong to the Local Authority."

Querist has taken the view that the words . . . "all things appurtenant thereto" include luminaire street-lighting poles, regardless of who placed them on the road.

No authority has been given for this proposition and it is doubtful if any exists. In *21 C.T.B.R. (N.S.) Case 11* and *(1976) 76 A.T.C. 404*, it was held that "public works . . . and all things appurtenant thereto" should not be construed *eiusdem generis* with "roads, bridges, ferries, wharves and jetties", so that a bus shelter was "public works under the control of the Local Authority" and as such, belonged to the Local Authority.

That decision did not deal fully with sub-s. 32(12) and gave the benefit of a doubt or ambiguity to the taxpayer. However, it lends some support for the notion that "public works" may include street lighting poles if it includes bus shelters, but the contrary view is that "other public works" must be of the same kind as "roads, bridges, ferries, wharves and jetties". The latter view is weakened, however, by the word "and" between "wharves" and "jetties". It is somewhat difficult to say that a pole is the "material" of a road, but sub-s. 174(3) of the *Electricity Act* 1976-1979 regards lighting installed by a Local Authority or Commissioner of Main Roads "as part of the Works comprising such road". A pole could be the "material" or "other public works", but the word "material" probably does not relate to "other public works" in sub-s. 32(12). "Other public works" probably include such poles, and would particularly include their own poles installed as recognised by sub-s. 174(3) of the Act, in a case when an Electric Authority did not install them.

The words "under the control of the Local Authority" seem to relate only to the words "other public works" because of the word "and" between "wharves" and "jetties". The words "and all things appurtenant thereto" in turn appear to relate to *all* that has gone before, i.e. appurtenant to roads, to bridges, and other public works. They probably do not mean "appurtenant to materials". Street lighting erected by the Local Authority itself would seem to be under the control of the Local Authority, and given the power to control and maintain roads and lighting as part of the works comprising such road, it is probably correct to say that either it is appurtenant to the road, or that it comprises "public works" or that it is appurtenant to public works and "belongs" to the Local Authority. These poles do not then belong to the Electricity Authority, nor has that Authority any control over them, and accordingly it would not be an appropriate defendant in any such case.

Likewise, if the Commissioner of Main Roads constructs and maintains street lighting on a road, and the system is metered by the Electricity Authority (as e.g. in the case of a Council in say a Botanical Gardens road), or it is constructed and maintained by another relevant statutory authority, it is difficult to see how an Electricity Authority could be liable in that event. The likely defendant would then be the Commissioner of Main Roads, or the relevant statutory body. It may include a Local Authority in a particular case. See sub-s. 17(2) of the *Main Roads Act* 1920-1976.

On the other hand, in the case of street lighting provided by an Electricity Authority under sub-ss. 174(1) and (2), either on its own volition or on the requisition of one of the three road authorities named,

"such lighting" is by sub-s. 174(1) constructed, maintained, and controlled by the Electricity Authority. Section 260 expressly requires that an Electricity Authority shall ensure that every line or work of the Electricity Authority shall be duly and effectively supervised and maintained in respect of both electrical and mechanical condition. It does not say by whom. Whether it can also be "under the control of the Local Authority" for the purpose of sub-s. 32(12) of the *Local Government Act* 1936-1978 is doubtful, particularly in view of the fact that under the Second Schedule to the *Electricity Act* 1976-1979, all electricity undertakings of previous authorities were divested from those authorities and vested in the new Electricity Authorities. "Undertaking" by definition in that Act and in the repealed *Electric Light and Power Act* 1896-1972 included works, electricity lines, poles and so on, and thus would include street lighting existing on commencement of the Act in 1976.

By s. 226, "all works and every part thereof vested in or held by an Electricity Authority subject to the provisions of this Act shall, notwithstanding that they have been constructed in or under any road . . . remain the property of the Electricity Authority", so lighting in existence at the commencement of the Act in 1976 is "vested in" the Electricity Authority, subject to the Act. It is true, however, that the words "construct, maintain and control works" in sub-s. 174(1) do not necessarily give ownership of new poles to an Electricity Authority, unless it can be said that any such works are "held by" an Electricity Authority under s. 226. See also ss. 199 and 425.

Whilst recognising the uncertainty, the better view is that such lighting is owned by the Electricity Authority, not the Local Authority. A proper defendant in such a case is the Electricity Authority, although it may be prudent to join both as defendants in view of the doubt. A Local Authority or other road authority might also be a defendant on some other basis which will be considered below.

In the case of declared roads, where lighting is installed on the requisition of the Commissioner or a Local Authority, sub-s. 17(2) of the *Main Roads Act* 1920-1976 is much wider in application. It makes no reference to "control" by the Commissioner, as in sub-s. 32(12) of the *Local Government Act* 1936-1978 in relation to public works. It treats materials of every declared road, and all matters and things appurtenant thereto, separately, and in para. 17(2)(b) includes all buildings, fences, posts and erections placed upon any and every declared road. Such things shall belong to the Commissioner. It is conceivable that poles erected on declared roads by an Electricity Authority either of its own volition or on requisition can be owned by both the Commissioner and the Electricity Authority, but para. 17(2)(b) might be read to mean "all buildings, posts and erections placed upon any and every declared road by the *Commissioner*", or s. 226 of the *Electricity Act* 1976-1979 may constitute an exception to the apparently general words in sub-s. 17(2). See s. 425 of the *Electricity Act* 1976-1979.

Again, in view of the doubt, it may be prudent to join both the Commissioner and the Electricity Authority as defendants although there may be another basis for holding the Commissioner also liable, as hereinafter referred to. Similar conditions would apply to the "other statutory body having control of the road", but whether or not there is any particular legislation such as sub-s. 32(12) of the *Local Government Act* 1936-1978 or sub-s. 17(2) of the *Main Roads Act* 1920-1976 is not known.

A further basis suggested by querist was that the road authority might become owners of the pole on the principle of "fixtures", the pole becoming part of the road which was under the control of the road authority. As stated above, ownership of the soil in general vests with the Crown, not in the Road Authority. A Local Authority has control over the roads and their use, and by sub-s. 32(12) owns the materials of the roads. See also sub-s. 17(2) of the *Main Roads Act* 1920-1976. This "ownership" and control relates to so much of the surface of the land, and below and above it, as is necessary to the proper exercise of its powers over the road as a road. It vests no property in the authority beyond the surface of the street and such portion as may be absolutely essential to the repairs and proper management of the street. It does not vest as such in them as owner. See *Municipal Council of Sydney* v. *Young* [1898] A.C. 457, *Wandsworth Board of Works* v. *United Telephone Co.* (1884) 13 Q.B.D. 904, and the very useful statement by Barton J. in *Municipal District of Concord* v. *Coles* (1906) 3 C.L.R. 96 at p. 111 where his Honour said:

> "The position of a municipal council seems to me to be this: It has a public trust, but it has no property, in the ordinary sense, in the soil of the road. It cannot block or stop a road from traffic and have the exclusive possession of it, unless there is something in the Statute (the Municipalities Act) giving it the power to interfere with the right of the public to pass and repass. So far as this council is concerned, it has certain rights given to it by Statute, and it is confined to the exercise of those rights; it has no exclusive possession whatever of the soil, albeit it may under certain circumstances be empowered by Statute to take temporary or occasional possession of part of it for the sole purpose of carrying out repairs or other duties. So that the position of the council is that it has public duties to perform coupled with such statutory licences as are requisite to enable it to perform those duties, and the mere statement of the position seems to involve a negation of the assumption that, in the ordinarily understood sense and in the sense of the provisions of this Act, it has any proprietary rights. I am therefore of the opinion that the right claimed by the council under this Act is not a proprietary right, either in respect of the road or of the licences given by Statute to the municipality, such as would justify the claim that it can lodge a caveat for an estate or interest in land the subject of an application under the Act."

The notion of fixtures applies to the land as land. If the Crown owns the fee simple, any principle of "fixtures" would relate to the Crown as owner. See *North Shore Gas Co.* v. *C.S.D. (N.S.W.)* (1939) 63 C.L.R. 52 at p. 68. But regardless of that question, what must be looked at is the degree and object of the annexation. See *Anthony* v. *The Commonwealth* (1973) 47 A.L.J.R. 83 at p. 89 where Walsh J. had no doubt in holding that telephone and electricity poles were not

fixtures, having regard to the object of placing them, ease of later removal, and such matters.

Under the *Electric Light and Power Act* 1896-1972, the rights of Local Authorities were recognised as to the placement and alteration of poles. This is expressly preserved in the *Electricity Act* 1976-1979. See s. 126 which covers placing, altering, or removal of electricity lines, or other works on roads. The Electricity Authority must obtain the prior consent of the Local Authority or Commissioner of Main Roads in the case of a declared road. See also ss. 217, 218, 219, 220 and 221. Poles can be removed, repaired and replaced. Roads are often rebuilt or widened, and poles shifted. It seems fairly clear that such poles, even though solidly embedded in the road for the time being, are not intended to remain a permanent part of the freehold. Their object is not for the better use or enjoyment of the land, but of the road. Frangible poles might be more readily movable.

Accordingly, I do not think that a Local Authority or Commissioner of Main Roads or other road authority, is owner by virtue of any such principle.

There may be another basis, however, under which it would be prudent to join a Local Authority or the Commissioner of Main Roads or other body as a defendant. Not only do they usually bring about the erection of street lighting poles on their roads and approve of the location (the Electricity Authority apparently having no such power except to light its own works), the Local Authority or the Commissioner or other authority must be consulted before such poles or other works are placed, altered or removed. See particularly s. 216, sub-ss. 216(5) and (7), and s. 218, also sub-s. 50(9) of the *Local Government Act* 1936-1978. The Local Authority or Commissioner or other authority has a say in the positioning of the poles, and apparently contributes to their maintenance. They may well have a say in the type of poles used, seeing they contribute towards the cost thereof.

The actual basis of agreements entered into are of course not known (and these would be relevant in an actual case). By reason of the involvement of the road authorities, it would seem prudent to join them as defendants in an appropriate case. If a Local Authority or Commissioner or other authority causes lighting poles to be installed on "their" road, even if the poles are "owned" by the person installing them, there seems little difference to the situation when a property owner causes or allows some object which belongs to another to be placed on his land or land which he controls, whereby a potentially dangerous situation is created and an entrant is injured by tripping over it or colliding with it. Both the owner or controller of the land and the owner of the object would be appropriate defendants.

Reference should also be made to the *Main Roads Act* 1920-1976. It should be noted that by s. 24 of that Act, many of the provisions of the *Local Government Act* 1936-1978 apply and shall be construed as if the reference to a Local Authority is a reference to the Commissioner, including sub-s. 52(10) which also has a counterpart in s.427 of the *Electricity Act* 1976-1979 in an action against Electricity Authorities for damages for injury to the person or property.

Querist has instructed me that a Local Authority has the care and management of roads within its area which are not declared under the *Main Roads Act* 1920-1976. Local Authority nevertheless appear to have certain functions and powers in relation to declared roads. Section 15 requires prior notice to a Local Authority before the Commissioner recommends to the Governor in Council that a road be declared. See also sub-s. 11(3), ss. 23 and 27, and sub-s. 32(2). Section 35 provides that save in so far as is inconsistent with this Act, the Local Authority shall have the same power over the declared roads within its area as it has over other roads. The Local Authority shall not carry out any permanent works on any declared road or works likely to affect the drainage, alignment or pavement of any declared road without the prior consent of the Commissioner. Certain financial obligations are imposed on the Local Authority, particularly as regards permanent improvement which may include street lighting. See sub-s. 33(1). Apparently the Local Authority can requisition the Electricity Authority to supply street lighting on a declared road in its area, even though, in the case of motorways, sub-s. 11B(1) prohibits the installation of any pole, new structure or thing on a motorway without the prior written consent of the Commissioner. This is an addition to the restriction generally imposed on Electricity Authorities by s. 216 of the *Electricity Act* 1976-1979.

It therefore seems that the Local Authority could be an appropriate defendant, not only in connection with roads in its area which are not declared, but also in connection with declared roads. The Commissioner of Main Roads could only be a defendant with respect to declared roads, including motorways. Other statutory road authorities could be a defendant with respect to roads under their control. Generally speaking, an Electricity Authority could be a defendant in all of those cases except where the authority concerned erected its own street lighting under its reserve power in sub-s. 174(3). In that case, the defendant would only be the road authority who erected it, or who effected some control over it.

(c) *Questions Asked by Querist as to Likely Defendants*

(i) I generally agree with the conclusion at p. 14 of Instructions to Advise that the proper defendants in the case of principal roads would be the Local Authority and Electricity Authority in the case of street lighting in existence in 1976 and constructed subsequently by an Electricity Authority on requisition of the Local Authority, but it is doubtful that the Local Authority is liable on the basis of ownership. The Local Authority probably would not be liable with respect to street lighting erected by an Electricity Authority on its own volition under sub-s. 174(2) to light its works. However, in the case of lighting erected by a Local Authority pursuant to its reserve power (see sub-s. 174(3)), it then would be the defendant, and not the Electricity Authority.

(ii) As to main roads and State highways, I generally agree that the defendant would be the Commis-

sioner of Main Roads, but doubt whether this is based upon his ownership of poles installed by an Electricity Authority. I also agree that in some circumstances, the Local Authority and Electricity Authority should be joined, but not if the Commissioner erected lighting pursuant to his reserve powers under sub-s. 174(3). The Local Authority might be an appropriate defendant in such a case. It is probably the case that neither the Commissioner nor the Local Authority would be an appropriate defendant if the Electricity Authority erected lighting of its volition to light its works (sub-s. 174(2)).

(iii) Motorways: Notwithstanding the provision of sub-s. 11B(6), it is not readily apparent that this situation is substantially different to (ii) above. Sub-s. 11B(6) is an added requirement for installation of lighting poles. "Declared road" is defined in s. 2 as any one of six types of roads. A "motorway" is a "declared road" designated a motorway under the Act. It is still a declared road. An Electricity Authority which erects lighting poles on the requisition of and with the consent of the Commissioner might still be liable by reason of sub-s. 174(1) of the *Electricity Act* 1976-1979. Whether a Local Authority could be a defendant depends upon the factual situation. If the Electricity Authority wished to erect lighting to light its works (sub-s. 174(2)), it would have to obtain the consent of the Commissioner. This may have the effect of making the Commissioner a suitable defendant in such a case, but this is doubtful.

(f) *Miscellaneous Electricity Authorities*

It is noted that by s. 150 of the *Electricity Act* 1976-1979, certain New South Wales Councils are, for the purposes of the *Electricity Act* 1976-1979, Electricity Authorities to supply electricity in certain parts of Queensland. They could be defendants in appropriate cases.

(g) *General Comments as to Defendants*

The foregoing illustrates the difficulty in determining who to sue in a particular case, but enough has been said to illustrate that given an appropriate cause of action, there is at least one defendant. In a particular situation, the potential plaintiff or his legal advisors would investigate the question of legal liability against all possible defendants before the action was commenced. This may take the form of demands by correspondence and in this way, the actual situation may be clarified. But if there is a doubt, or if the proposed defendants do not co-operate in clarifying the issue before they are all joined as defendants, the plaintiff would probably sue all reasonably likely defendants. The processes of discovery and interrogatories would probably clarify the liabilty question, and unless the plaintiff unreasonably or unnecessarily or vexatiously joined a defendant, he would probably not be damnified in costs thrown away, and may even be awarded them, depending upon the discretion of the court in the particular case.

2. *LEGAL LIABILITY*

The legal theories are based upon:

(a) Negligence

(b) Nuisance.

(a) *Negligence*

(1) *Generally*

It is clear that installation of street lighting is a *power* conferred by statute, and not a *duty*. The relevant authority is free to decide whether or not to requisition for street lighting or to install it if the Electricity Authority does not. Likewise the Electricity Authority may (not must) install it on requisition. If the power is not exercised, it is well settled that no cause of action arises, subject to the remarks of Lord Wilberforce in *Anns'* case that an authority should give proper consideration to the question of whether a power shall be exercised or not. But here the power has been exercised.

On the information available, it is also clear that the legislation has not authorised the particular act or acts to be done in *the way* in which they were in fact done. No legislation provides for the actual specification or positioning of street lighting poles, or sets any standard which, if there is non-compliance, might give rise to an action for breach of statutory duty, or which, if fully complied with, would be a complete answer to any allegation of negligence or nuisance. Nor does any legislation provide that the authority is free to install whatever type of pole *it* selects in whatever location on the road *it* selects. In such cases, the statutory authority to do the very act which has caused the damage is, of course, an answer to the action: *McClelland* v. *Manchester Corporation* [1912] 1 K.B. 118 at p. 130. No question can then arise as to the exercise of the powers being reasonable. But such is also not the case now under consideration. It seems that where no particular way of doing the act authorised by statute is specified, it must be done in a reasonable way and not in an unreasonable way: *Metropolitan Water Sewerage and Drainage Board* v. *O.K. Elliott Ltd* (1934) 52 C.L.R. 134 at pp. 144-145, per Starke J.

It is difficult to understand the contention raised by some statutory authorities that the misfeasance/non-feasance rules will provide immunity if they continue to use existing rigid poles. That principle merely states that if a highway authority leaves a road alone and it gets out of repair, there is no doubt that no action can be brought although damage ensues. But this doctrine has no application to a case when a road authority has done something, made up or altered or diverted a highway, or has installed something on a road, and has omitted some precaution which, if taken, would have made the work safe instead of dangerous. Once it is established that the authority did something to the road, the case is removed from the category of non-feasance. If the work was imperfect and incomplete it became a case of misfeasance and not non-feasance, although damage was caused by an omission to do something that ought to have been done. It has the same consequence as the commission of something that ought not to have been done. See Lush J. in

McClelland v. *Manchester Corporation* (supra) at p. 127.

In any event for the purposes of any such immunity from liability, it has been doubted whether seats, lamp posts, telephone boxes, direction posts and such like are part of the highway: *Drake* v. *Bedfordshire County Council* [1944] 1 All E.R. 633 at p. 638. The immunity has been limited to the road surface itself and those objects such as bridges and culverts which are treated as forming part of the highway itself. It relates to a failure to repair by the road authority and gives no immunity to an Electricity Authority. The question in this case is not a *failure to repair* street lighting poles as such, but rather whether their design and location is reasonably safe when installed or when a road is altered, or when circumstance and traffic usage changes.

So the question reverts to the ordinary principles of negligence applicable to the exercise of functions empowered by statute, the authority or authorities having duly decided to install and having in fact installed street lighting, whether of their own volition, or as the result of requisition and agreement.

No instructions have been given as to whether street lighting would be just as effective to achieve its intended purposes without increasing cost or risk of inconvenience in some way or other, if it was located further away from the curb. With regard to utility poles, however, instructions indicate that if the poles are further from the curb, the risk of collision is considerably reduced. It may be that such positioning of street lighting is not possible in all cases, depending on the location and particular space available; e.g. poles may be erected in a median strip or the footpath may be very narrow. It may be that street lighting would be less effective if the poles were positioned well off the carriageway. Likewise, no suggestion has been made of the availability or practicability of alternative methods of street lighting other than that carried on poles at the roadside.

It is understood that there is some type of departmental agreement or arrangement between various authorities which determines the positioning of various services in the footpath, i.e. telephone, gas, water, sewerage, electricity, but details of this, or its relevance to the problem under review is not known. Whilst these matters are not directly relevant to the two specific questions asked on page 1 [p. 127, supra] of this advice, the positioning of a structure may be very relevant to the question of whether reasonable care was taken in the circumstances, location being also relevant to design: *Levine* v. *Morris* [1970] 1 All E.R. 144.

Road and other statutory authorities have been held liable in numerous cases dealing with the negligent exercise of their statutory powers. *Anns'* case does not say that they are no longer liable, although in some respects it might be thought that a plaintiff's task is now made more difficult.

The traditional approach is that adopted by Lord Justice Atkin in *Sheppard* v. *Glossop Corporation* [1921] 3 K.B. 132 at p. 150:

> "If it decides to light any area, its lamps and appliances must be placed and maintained with reasonable care so as to avoid danger to wayfarers or owners or occupiers of adjoining property."

Lord Justice Scrutton at p. 149 said:

> "The power given them is discretionary. If they do light they will be liable in damages for negligence in lighting; negligence in allowing gas or electricity to escape; negligence on putting posts in a highway without warning, and negligence in placing traps and dangers in the streets and not lighting them at night."

It is submitted that this principle applies with equal force to the design and location of street lighting poles which are traps or dangers to a motorist in the event of a foreseeable collision with them. This principle was adopted by Viscount Simon in *East Suffolk Rivers Catchment Board* v. *Kent* [1941] A.C. 74 at p. 87 where he said:

> "If the public body by its unskilful intervention created new dangers or traps, it would be liable for its negligence to those who suffered thereby."

His Lordship then approved of the above passage by Lord Justice Scrutton. Lord Romer at p. 101 said:

> "Bankes L.J. said ([1921] 3 K.B. 143) 'The appellants have merely exercised the discretion vested in them by the Legislature. They were under no obligation to place a lamp post at this particular spot; having placed it there they were not bound to keep it there; and if they kept it there they were not bound to supply it with gas, and are not to be made liable for merely extinguishing the light at any particular hour'. In making these observations the Lord Justice was not (as was made clear in an earlier part of his judgment) contemplating the case of a person being injured by running into an unlighted lamp that had been placed in the street by the corporation. The injury in that case would have been caused directly by the exercise of the power, i.e. it would not have been suffered at all had the corporation refrained from exercising the power. This distinction was very clearly pointed out by Scrutton L.J. Referring to local authorities who have had conferred upon them a discretionary power of lighting he said 'If they do light they will be liable in damages for negligence in lighting; negligence in allowing gas or electricity to escape; negligence in putting posts in a highway without warning; and negligence in placing traps and dangers in the streets and not lighting them at night. But they are not liable merely because in the exercise of their discretion they do not light, or because they discontinue lighting, dangers which they have not themselves created'."

This and numerous other authorities show that a duty clearly exists, the question being whether the duty was broken in the particular circumstances. *Sheppard's* case drew a distinction between on the one hand the discretion whether to light at all, and having exercised the powers of lighting, whether all lights should be left burning all night or could (as in that case) be extinguished in order to save electricity, whereby a plaintiff fell into a ditch not placed there by the authority, and on the other hand by the exercise of a discretion to install lighting whereby a plaintiff might be injured by collision with an unlit pole. It is clear that the Court in *Sheppard's* case and the House of Lords in the *East*

Suffolk case plainly recognised that the authority not only owed a duty in the latter situation, but that it could be liable if, in the exercise of its powers, it did something negligently. In other words, the injury which resulted from the discretionary decision permitted by statute to refrain from lighting at all or to turn off the lights at a certain hour, being a proper policy decision even at the operational level, could be contrasted with injury sustained by negligence in the exercise of a power.

This approach seems to have been very simple and attractive. A duty of care existed. Was the duty broken in the circumstances of the case? This approach has general support from the remarks of Dixon J. and Williams J. in *Thompson* v. *The Council of the Municipality of Bankstown* (1952) 87 C.L.R. 619, particularly at p. 639, in a quite different case involving an injury by electric shock to a boy who came into contact with a live wire hanging uninsulated some 8 feet above the ground on a pole, and who climbed up on top of a bicycle and reached the wire in a way not clearly explained. A duty of care clearly existed as it was reasonably foreseeable that children would, by one means or another, attain some level on or in connection with its posts higher than their unaided reach from the ground would allow.

Likewise, a road authority (and electricity authority) should clearly foresee that a motorist might leave the roadway and collide with a pole: per Widgery L.J. in *Levine* v. *Morris* at p. 150, citing Lord du Parcq in *L.P.T.B.* v. *Upson* [1949] 1 All E.R. 60 at p. 72. The relevant degree of relationship of proximity or neighbourhood existed, such that, in the reasonable contemplation of the authority, carelessness on its part may be likely to cause damage to road users: per Lord Wilberforce in *Anns*' case at p. 751.

This approach then depended on the standard of care achieved by the defendant. The remarks of Latham C.J. in *Mercer* v. *Commissioner of Road Transport* (supra) cited at p. 2 above [p. 127 supra] seem relevant. Was the device used (and its location) appropriate in the circumstances? Dixon J. in that case at p. 598 referred to the burden on the plaintiff to affirmatively prove a breach of the duty of care by the failure to use a particular device called "the dead man's handle" on the runaway tram. His Honour's judgment is illuminating because it refers to tests made by tramway authorities who had decided to reject this new device (pp. 599-600), to the fact that evidence shows that the device could cause other risks, to the records of accidents which had occurred when no new devices were used (p. 600), and to other matters. The question was left to the jury as to whether or not the Commissioner was negligent in not providing the new device. The jury answered "yes" with the rider that the Commissioner was not careless in not using it in that case, but that he was justified in taking the remote risk of claims for damages that might arise from accidents as a direct result.

It was this finding which caused the difference of opinion of the Court three to two, Latham C.J. and Dixon J. saying that the Commissioner was not negligent in the circumstances. Dixon J., after referring to the statement which showed the infrequency of risk, and the burden on the plaintiff of proving the utility and advantage of using the device, said at p. 602:

> "On the other hand, the deliberate judgment of those responsible for the tramways system of Melbourne and Sydney led to the rejection of the devices many years ago. There is no foundation, it appears to me, for the suggestion that they were not adopted because tramways are an obsolescent form of public transportation. At the time when the devices were rejected no other form of street transport rivalled the tramways and since that date in neither of the two cities concerned has there been any outward display on the part of the tramways authorities of any lack of faith in the immediate future of their systems. In matters of special or technical knowledge the course which is commonly adopted forms prima facie the measure of care and skill required. The proper equipment and conduct of a tramway system is a matter of special knowledge. Into that knowledge countless considerations enter, but engineering practice and experience combined with experiment will, doubtless, be the determining factors when the question is whether a particular appliance or device should be adopted. A high degree of skill and care to ensure safety must be exercised by those who undertake the carrying of passengers. But to fulfil that obligation it is enough if they adopt 'the best precautions in known practical use, for securing the safety and convenience of their passengers. . . . Both objects must be looked to. It is easy to conceive a precaution, for example, a slower rate of speed, which would add a very small degree of security, while it would entail a very great degree of inconvenience. And a company ought not be found guilty' of negligence 'merely because they might have done something more for safety, at a far greater sacrifice of convenience'."

With such an approach, given there is a duty, it by no means follows that an authority would be held liable. Dixon J. referred to many factors very relevant for consideration in the present problem which were necessary "in considering the extent and nature of the measures that duty of care demands" (p. 601).

Evidence advanced would include the gravity, frequency and imminence of the risk (i.e. the likelihood and seriousness of the harm, statistics, the particular location etc.), the utility of the street lighting and its poles *as located* (i.e. whether the location at the danger spot was or was not essential to the proper efficient operation of the street lighting system for its various purposes), the likelihood of other risks if the type of poles was changed, and the cost or burden of replacing them. As indicated in the instructions, risk of injury or damage from frangible poles is said to be remote, and this is capable of acceptable proof. An authority would doubtless lead evidence to the contrary if it could, in a case which alleged that it should have used frangible poles.

All of these matters would go to whether in the circumstances, the relevant standard of care was attained, and this is determined by the tribunal of fact. Traditionally the existence of a duty (as alleged) is a question of law, whereas the question of whether the duty was broken (the standard of care) is a question of fact. Lord Wilberforce in *Anns*' case at p. 758 said that whether the inspector acted outside any delegated discretion either as to the making of the inspections or

as to the manner of inspections, was a matter to be determined at the trial, so that the existence of a duty of care depended upon findings of fact.

The question therefore is to what extent, if any, the decision in *Anns'* case affects the prospects of a plaintiff succeeding against a relevant authority. Querist raised the question whether *Levine's* case, a useful precedent in this problem, might now be decided differently. It is clear that Lord Wilberforce at p. 755F reaffirmed the principle that:

> "A plaintiff complaining of negligence must prove, the burden being on him, that action taken was not within the limits of a discretion bona fide exercised, before he can begin to rely upon a common law duty of care. But if he can do this, he should in principle, be able to sue."

This merely restates that a plaintiff has the onus of proving all elements in his cause of action i.e. duty, breach, causation, and legally recognisable damages. It might be thought that it places a very difficult burden on the plaintiff. So be it. It should be added that the onus is on the defendant to plead and to prove contributory negligence by the plaintiff.

From the remarks of Sachs and Widgery L.JJ. in *Levine's* case it might appear that they placed the onus on the defendant to prove "error of judgment" or that it acted after consideration of all relevant competing circumstances, and that the decision might be questioned on that basis. In that case a duty of care to motorists was assumed, at least in those circumstances (a dangerous stretch of road which might cause vehicles to leave the carriageway — quite rightly in my opinion), and the Court in a traditional way devoted its attention to what conduct (or standard) would amount to a breach of duty.

If the later decision in *Anns* case (as to onus being on a plaintiff to prove that the acts complained of were not within the limits of a discretion bona fide exercised) applies to a case where poles or signs are placed on a highway pursuant to statutory powers to light or to direct traffic (as opposed to whether *Anns'* case is limited to a situation where there was an omission to act in a case where there was a discretion whether to act or not, or in the manner of acting), it is possible that *Levine's* case was wrongly decided, but the better view is that it is correct. No relevant statutory provisions are set out in the report.

The driver's case against the Ministry was based on (a) negligence in the design of the road and (b) dangers flowing from the skid were greatly increased by negligence in siting the massive sign where it did. The driver adduced evidence of other accidents on the same stretch of road, of cars getting out of control on it, of alterations made to the road later, of equally visible alternative locations for the sign, and of the resiting of the sign later to an equally visible location. Even though the trial judge rejected the contention of negligence in road design, it was common ground that although the road conformed to the minimum standard (as opposed to the desirable standard) for a 60 MPH design, it was substandard in relation to the minimum requirement for a 70 MPH road, as contained in the standards published in 1961.

The Ministry asserted as a first line of defence that it owed no duty at all to a motorist who might leave the carriageway, to take reasonable care not to impose unnecessary hazards to their safety. This was flatly rejected by the Court of Appeal, and *Anns'* case is consistent with a duty of care existing, at least a *prima facie* duty of care. But when the judgments are fully examined, it seems that the decision in *Levine's* case would probably have been the same. The evidence as a whole, would probably justify a court in concluding that the action in siting the sign was not within the limits of a discretion bona fide exercised, because of the finding as to the condition of the road, the alternative locations of equal visibility, the changes to the road and sign after the accident and so on. There is some evidence that there was a failure to exercise a discretion at all. What Sachs and Widgery L.JJ. might really have been saying was that there was *prima facie* proof by the plaintiff that the siting of the sign was not within the limits of a discretion bona fide exercised, and that the defendant made no attempt by evidence to rebut that *prima facie* evidence.

This finds support from the remarks of Starke J. in the *Metropolitan Water Sewerage* case (supra) at p. 145, where he quoted from Farwell J. in *Roberts* v. *Charing Cross Railway Co.* (1903) 87 L.T. at p. 743 as follows:

> "If the Legislature has given powers and those powers are being used for the purpose of carrying out the work authorised, and it is admitted that the mode in which they are being used is unreasonable, that is an abuse of the power so given, and is therefore ultra vires and for such excess the ordinary legal remedy by action subsists unless that right be explicitly taken away."

On the other hand, it may be wondered whether the decision in *Anns'* case (as opposed to some of the principles contained in it) applies to the questions the subject of this advice, or to *Levine's* case.

Anns' case clearly held that a common law duty of care *can* arise over and above, or perhaps alongside public law powers and duties, p. 754B and p. 755G-H. If a duty is not performed, this may give a good cause of action, just as if it is performed negligently.

If a *power* is not exercised, it gives no right of action, although there may be an obligation to properly consider whether a power should be exercised or not which may be "challenged" in the courts (p. 755C). The nature of this "challenge" is uncertain. Lord Salmon at p 762D-E said the remedy was by certiorari or mandamus, although Lord Wilberforce seems to give a right of action (p. 760F-G). If so, *Anns'* case extends available remedies, but it would not be appropriate in a case of a failure to consider the exercise of a street lighting power. It is more apt to cases like *Anns'* or the *East Suffolk* situation where there was a *power* to take proposed action which would assist in protecting a building owner against defective work or a land owner against flooding. This may be one reason for attempting to distinguish *Anns'* case. Once the discretion to install poles *is* exercised, there is no discretion left. The only discretion in this context is whether or not to use a different type of pole, and a failure to consider this aspect *before* it is installed seems rather to go to the breach than to the existence of a duty of care.

If a power is exercised, and in the exercise of that power a statute prescribes what is to be done, there can be no common law action even if damages occur, providing the authority does what the statute prescribes (subject to certain claims for compensation allowed by s. 51 of the *Local Authorities Act* 1901 as incorporated into the *Main Roads Act* 1920-1976 by s. 24 thereof by a person not himself in default). If the power is exercised, and there is nothing in the legislation to prescribe how and in what manner it is to be done, it must be exercised reasonably but there can after *Anns'* case, apparently be cases at the "operational" level where there is a discretionary (or policy) factor, which if exercised in a bona fide manner, negates any *prima facie* duty of care (Lord Wilberforce p. 752A-B). If this is of general application, it appears to restrict the traditional approach in cases against road authorities.

Cases dealing with discretion at the operational level are few. The first is the *East Suffolk* case. The second is *Dorset Yacht Co. Ltd* v. *Home Office* [1970] A.C. 1004, and the third is *Anns'* case .They all deal with a situation where, in the exercise of a power, there was an alleged failure or omission to act, to physically do some continuing activity. The allegation was that in failing to do something positive, the plaintiff suffered damage, whereas in the subject problem there is injury caused in the positive sense resulting from the *exercise* (not the non-exercise) of statutory powers, by a manner of exercise which is negligent. Those cases deal with the insufficient use of *statutory powers* (as distinct from duties) as opposed to the *sufficient* albeit negligent use *thereof*.

It is true that in *East Suffolk*, the Board actually did work negligently, as opposed to the alleged failure to bring in more competent workers and materials, but the "discretionary" area was said to be the decision of the Board to provide a certain number and type of workers that best accorded with its resources to do something they were not obliged to do. It is clear from *Anns'* case that the House of Lords did not approve of the *East Suffolk* case as such (see Lord Wilberforce p. 757A-B, H, and p. 758A, and Lord Salmon p. 765F-H). It was held that there could be room once outside the area of legitimate discretion or policy, for a duty of care at common law, even in the *East Suffolk* case. That case has been very much criticised, but the principle in *Sheppard* v. *Glossop Corporation* (supra) was therein adopted with approval. *Sheppard's* case dealt with an allegation as to a failure to keep street lights illuminated after a certain hour.

Likewise in *Anns'* case, Lord Wilberforce, in referring to *Sheppard's* case (p. 756E) said that the decision "for economy reasons, to extinguish the lighting on Christmas night" clearly was within the discretion of the authority "but Scrutton L.J. in the Court of Appeal, at p. 146, contrasted this situation with one where 'an option is given by statute to an authority to do or not to do a thing and it elects to do the thing and does it negligently' ". Lord Wilberforce seems to have approved *Sheppard's* case and seems to have recognised that if an authority elects to exercise a power, and in fact exercises it negligently, the situation is in a different category. This is more akin to the present situation where there has not been a failure to light streets (as alleged in *Sheppard's* case), or a failure to inspect (*Anns'* case) but rather a failure to adopt a safe design for street lighting poles. Poles are installed which are unsafe.

A basis suggested in various decisions for holding that a duty cannot arise in areas involving the exercise of discretionary powers is that the courts have no criteria by which to balance the conflicting interests involved, e.g. in the *Dorset Yacht* case there were the interests of the inmates of society at large, and those likely to be immediately affected by the type of conduct engaged upon, and this point is very appropriate to that case. Likewise, in a case when an authority decides to use its scarce resources to light or drain area A instead of area B, or to conduct an inspection or not. Lord Diplock, in the *Dorset Yacht* case said that the common law duty of care depended upon the type of statute and the nature of the activities outlined by statute. The statute might allow the taking of risks in that case.

But the court should have little difficulty, on appropriate evidence, in balancing the interests of particular road users likely to be injured on the one hand, and the interests of the authority on the other in cases where the authority leaves an excavation unguarded, or does not use support railings or lighting, or leaves a pile of soil on the footpath without lighting, or without sufficient lighting, or uses a pole that is cracked or dangerous, or uses or locates a pole highly unsuitable to modern-day conditions and traffic. In the case of street lighting, the other interest is of course that of the general road users entitled to the benefit of lighting, but it is difficult to see how their interest is affected.

It may be wondered also just how far the economic argument may be advanced by an authority in order to negate the existence of a duty (or to prove no breach of the duty) in such a case. Fleming, *The Law of Torts*, (Law Book Co. Ltd, Sydney) 5th Edition p. 118 points out that economic factors are given weight, especially regarding the value of the defendant's activity and the cost of eliminating the risk, but that on the whole, judicial opinions do not make much of this for good reasons, such as loss distribution, and non-economic value, like health and life, freedom and privacy which defy comparison with competing economic values. Negligence is not just a matter of calculating the point at which the cost of injury to victims (i.e. damages) exceeds that of providing safety precautions. There is no reason why this should not be so, particularly with *particular* dangerous poles as opposed to whole systems. It is no "defence" to say that because an authority entitled to drive vehicles cannot afford to have a defective vehicle repaired, it is under no duty or does not break the duty if the driver of that vehicle injures someone because the defects led to the collision.

Assuming *Anns'* case is of general application, and if a plaintiff can show that the act complained of (the installation of unsafe poles) was not within the limits of a discretion bona fide exercised, a duty of care exists. He must then still show that the defendant failed to take reasonable care to ensure that duty was not broken. In *Anns'* case (p. 758F), Lord Wilberforce in dealing with the nature of the duty, said this must be related closely to the purpose for which the power of

inspection was granted, namely, to ensure compliance with the by-laws. The duty is to take reasonable care to ensure that the builder does not cover in foundations which do not comply with the by-law requirement. See also p. 750D-F, where he said "the standard of care must be related to the duty to be performed, namely to ensure compliance with the by-laws". His Honour added, "But the duty, heavily operational though it may be, is still a duty arising under statute."

In the case under consideration, if there is a duty of care, the standard of care must be related to the "duty" to be performed. There are no relevant by-laws to be complied with. The "duty" to be performed seems to be the "duty" arising under statute pursuant to a power to install street lighting. It must be a duty to install *safe* street lighting, part of which is prescribed by the *Electricity Regulations* 1977 as to electrical safety when an Electricity Authority installs it; but in case of a road authority who installs lighting, there are no such regulations unless s. 293 is invoked. The power must be exercised reasonably and with reasonable care. See Starke J. in the *Metropolitan Water Sewerage and Drainage Board* case at pp. 140 and 145, and *Mersey Docks Harbour Board Trustees* v. *Gibbs* [1866] L.R. 1 H.L. 93 which held that there is a duty in the *exercise* of statutory powers to take reasonable care to ensure that in carrying out these powers, no unnecessary damage was done and that the thing was in a fit state for use by the public.

It seems that the facts necessary to prove negligence, i.e. a breach of the duty of care, will in many cases also be the facts necessary to prove that the authority exceeded its discretion in order to establish a duty of care, unless there are other factors to prove that its discretion was exceeded, but Lord Diplock, in the *Dorset Yacht* case, at p. 1070, said that even if the acts or omissions of the Borstal officers were done in breach of their instructions and so were ultra vires in public law, it does not follow that they were done in breach of care owed by the officers to the plaintiff in civil law. Lord Wilberforce may have taken a similar view (although this is by no means clear) by his remarks at p. 758 when he said:

> "In the event of a positive determination, and only so, can a duty of care arise."

This suggests that a plaintiff must first prove that such an act is beyond power before a duty of care *can* arise. This of course, can often place a difficult burden on a plaintiff. But Starke J. in the *Metropolitan Water Drainage and Sewerage Board* case at p. 145, said that if the mode in which statutory powers are being used is unreasonable that is an abuse of the power so given and is *therefore* ultra vires. His Honour added that for such excesses the ordinary legal remedy by action subsists.

Developments from *Anns'* case must await subsequent decision of the courts. If *Anns'* case is of general application including the situation under review, and if an authority exercises the power negligently, the plaintiff will arguably have a case, providing he can prove either that the selection of the type of pole and/or its location is an operational decision, not based upon any policy considerations or if a discretionary policy was operative that the act of selection of the particular pole and/or its particular location was outside the ambit of that discretion.

There are difficulties. Failure to utilise the safest design of pole and locating it in a dangerous place may be evidence of a failure to exercise a discretion by taking into account irrelevant considerations such as to render the decision outside power, as the querist states at p. 24. This is supported by the comments of Starke J. above, and appears to be the preferred view.

If an authority attempted to merely resolve that *all* poles be rigid or placed at the kerb, this would surely not in any event be within the limits of a discretion bona fide exercised. *All* relevant factors must be taken into account and the decision must be reasonable. It would not be a proper exercise of discretion to place weight on one or some factors to the exclusion of others. A plaintiff would probably rely on discovery and interrogatories in a contested case, and possibly even evidence at the trial, before he could prove such matters. The approach suggested at p. 24 has considerable appeal and may be upheld by a court.

It is therefore arguable that *Anns'* case has no relevance in the current situation. The approach which is appealing is that there is a duty of care, the argument then hinging around whether the *standard* of care is appropriate in the circumstances. See *Mercer's* case (Latham C.J. and Dixon J.). Each party then advances whatever evidence it can to sustain its case. The authority might well be able to convince the tribunal by evidence (it has an *evidentiary* onus, at least where the plaintiff makes out a *prima facie* case) that, in the circumstances of a particular case, notwithstanding that it owed a duty, it achieved a suitable standard of care by a consideration of such balancing factors as the purpose of lighting, the utility of its conduct, the alernative (*Mercers'* case), the cost of poles, and so on.

Causation seems to present less difficulty. The problem of contributory negligence is likely to be a very live issue, but a driver could leave the road due to "inevitable accident" or due to other factors entirely attributable to the road authority, e.g. a defective road surface of which there was no warning. The other approach is to distinguish *accident* causation from *injury* causation: see *Froom* v. *Butcher* [1976] 1 Q.B. 286 at p. 292.

Damages must of course be proved by a plaintiff, which are not too remote.

(2) *Conclusion as to Negligence*

(a) If a conscious relevant policy decision is taken to use frangible poles because all modern engineering research has shown that they are the safest possible equipment in the event of a collision, with the risk of injury very remote, and if the decision is to place them X metres from the carriageway, being the necessary or optimum distance in order to provide effective lighting to the road generally and to achieve all of the purposes of street lighting, it is difficult to see how an authority would be held liable in the event of a collision and the unlikely result of injury to someone or to some property. This conclusion can be arrived at on any of three bases:

(i) Assuming *Anns'* case is applicable to this situation, a conscious relevant policy decision along the above lines negates any duty of care which clearly arises by the proximity or neighbourhood test.

(ii) Assume a duty of care is not negatived. If, on the evidence, it is shown that the authority has after proper research, used the best known devices and equipment and positioned in such a way that whilst there is a risk of collision, this positioning is necessary to achieve the overall purpose of street lighting, and is unlikely to cause damage to anyone, the authority has used reasonable care. Its standard of care was appropriate in the circumstances. See Latham C.J. in *Mercer* v. *Commissioner for Road Transport* (1936) 56 C.L.R. at p. 589 and also Dixon J. at pp. 597, 600 and 602.

(iii) As reasonably foreseeable damages are the gist of the action, and as all the evidence shows that any damages are extremely remote, a plaintiff could not recover. So it is unlikely that the authority would be held liable on this basis.

(b) The converse position presents more difficulty:

(i) If a conscious relevant policy decision is taken to use rigid timber or other poles because they are cheapest to install, maintain, and replace, or because the authority has limited funds, or because the cutting and supply of timber poles keeps the logging industry in employment in country areas, or because the authorities' equipment and maintenance teams and depots are geared to these types of poles, and so on, and if the authority had consciously considered the use of frangible poles but rejected their use because of alternative risks, and if the decision is made to place rigid poles in a position where they do provide a risk of collision and damages, but that position is necessary in order to achieve the purposes of effective street lighting for *all* road users, it is again unlikely that an authority will be held liable. The basis falls within (i) and (ii) above, not (iii) as damages are reasonably foreseeable.

(ii) However, if *Anns'* case is of general application, a basis of liability in the authority might exist if the plaintiff can show that the authority acted outside power, and it is arguable that failure to select and place the best equipment is evidence of so acting. There may be a mix of policy and operational decisions. There is the *selection* of the type of pole and its *placement* which may fall into either category.

Placement alone may be "operational". If there is no proper policy as to its placement, and if a hazard might have been reduced by reasonable care by placement a little further from the curb (if that is possible as to availability of an alternative position and so as still to achieve effective street lighting in that alternative position), there is no reason why liability should not exist. It may have been left to the operational staff to install the poles where it was "usual", in accordance with a plan.

(iii) If *Anns'* case does not apply in the subject situation, ordinary principles of negligence should apply, *Levine's* case being a good illustration.

(3) I agree generally with the conclusions of querist on the four hypothetical situations posed at pp. 25 to 28 of Instructions to Advise. The views there expressed are arguable and with some prospects of success. It is necessary to state however, that very much depends upon the actual facts of a particular case, the actual pole, the road and other circumstances including the particular functions of the authority sought to be joined. Attention has been drawn throughout this memorandum to such reservations.

(b) *Nuisance*

I agree generally with the observations of querist at pp. 29-32 of Instructions to Advise. Reference is made at p. 30 to the fact that statutory authority is a defence to an allegation of public nuisance, and if there is no lawful authority for its placement, it is a nuisance. It would be wise in a particular case to check if the placing of the particular pole was duly authorised.

With Compliments,

(Signed) W. C. LEE, Q.C.